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No. .....

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

72-793

**HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,**

**Petitioners,**

**v.**

**UNITED STATES HOUSING AUTHORITY, et al., and**

**NATIONAL TENANTS ORGANIZATION, et al.,**

**Respondents.**

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## INDEX


PAGE

Opinions below ..... 1

Jurisdiction ..... 2

Questions presented ..... 2

Constitutional provision involved ..... 3

Statutory provisions involved ..... 3

Statement of the case ..... 5

Reasons for granting the writ ..... 12

1. The Decision of the Court of Appeals Presents Important Questions of Federal Law Which Should Be Settled By This Court ..... 12

2. The Court of Appeals Decided Important Federal Questions In A Way Which Conflicts With Decisions Of This Court And Other Courts Of Appeal 12

   (a) On The Issues Of The Power Of HUD and Contract Impairment, The Court of Appeals Did Not Follow *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969) ..... 12

   (b) On The Issue Of Whether HUD Was Bound By The Rule Making Provisions Of The Administrative Procedure Act, The Court of Appeals Did Not Follow The Decisions Of This Court In *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1960), *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), And Its Decision Conflicts With That Of Other Courts Of Appeal ..... 16

3. The Decision Of The Court of Appeals Is Such As To Require The Exercise Of This Court's Power Of Supervision ..... 20

Conclusion ..... 22

Index to Appendix ..... 23

Certificate of Service ..... A-58

## CITATIONS


PAGE

CASES:

*American Airlines, Inc.* v. *C.A.B.*, 359 F.2d 624 (D.C. Cir. 1966) ..... 21

*Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) ..... 18

*Housing Authority of Woonsocket* v. *Fitzik*, 289 A.2d 658 (R.I., 1972) ..... 21

*Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2nd Cir. 1971) ..... 18

*Lynch* v. *U. S.*, 292 U.S. 571 (1934) ..... 15

*N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) ..... 2, 10, 16, 17, 19

*Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940) .... 16, 17

*Schecter Poultry Corp.* v. *U. S.*, 295 U.S. 495 (1935) .. 21

*Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740 (3rd Cir. 1969) ... 19

*Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969) ..... 2, 7, 9, 10, 12, 15, 16

*Yakus* v. *United States*, 321 U.S. 414 (1944) ..... 21

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, twenty four local housing authorities operating federally financed housing projects in eighteen states (LHA's), on their own behalf and on behalf of a class consisting of all such LHA's in the United States, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 28, 1972.

## OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears in the Appendix (A-22). The opinion of the United States District Court for the District of Nebraska is reported at 54 FRD 402 and appears in the Appendix hereto (A-1).

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 28, 1972. A timely petition for rehearing in banc (A-40) was denied on October 26, 1972 (A-57). On October 31, 1972, on motion of petitioners, the Court of Appeals stayed its mandate for thirty days and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether Circulars RHM 7465.8 and RHM 7465.9 (Circulars 8 and 9) promulgated in February, 1971, by the Department of Housing and Urban Development (HUD) are invalid because they violate the principles set forth by this Court in *Thorpe* v. *Housing Authority,* 393 U.S. 268 (1969), and "the congressional policy of allowing [LHA's] to retain maximum control over the administration of federally financed housing projects" (393 U.S. at 278).

2. Whether the changes ordered in all the leases between LHA's and their tenants by Circulars 8 and 9 and HUD's threat to repudiate its obligations under its annual contribution contracts with LHA's which fail to implement the Circulars amount to impairment of contract rights in violation of the Fifth Amendment (*Thorpe* v. *Housing Authority,* 393 U.S. 268, 279 (1969)).

3. Whether HUD Circulars 8 and 9 are unlawful because HUD issued them without following the notice provisions for rule-making required by Section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and the principles set forth by this Court in *N.L.R.B.* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969), which have been followed by Courts of Appeal except that for the Eighth Circuit.

4. Whether HUD, in issuing Circulars 8 and 9, so offended the concept of a fair hearing as to deny plaintiffs due process.

5. Whether HUD Circulars 8 and 9 deny plaintiffs due process because they constitute a delegation of power to "impartial officials" and "hearing panels" so broad as to be unconstitutional.

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATUTORY PROVISIONS INVOLVED

Housing Act of 1937 as amended:

> "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation".
>
> • • • •
>
> "It is the policy of the United States to vest in the local housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies". (§ 1, 42 USC §1401)
>
> • • • •

"The term 'administration' means any or all undertakings necessary for management, operation, maintenance, or financing, in connection with a low-rent housing or slum-clearance project, subsequent to physical completion". (§ 2(6), 42 U.S.C. § 1420(6))

• • • •

"[HUD] may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter". (§ 8, 42 U.S.C. § 1408)

Section 4 of the Administrative Procedure Act:

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved — . . . .

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

"(b) General notice of proposed rule-making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

• • • •

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incor-

porate in the rules adopted a concise general statement of their basis and purpose * * *". (5 U.S.C. § 553)

Section 10 of the Administrative Procedure Act:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law." (5 U.S.C. § 706(2)(C)(D))

## STATEMENT OF THE CASE

In 1969 the National Tenants Organization (NTO) presented HUD with a series of demands on behalf of public housing tenants. Failing to have its demands recognized, NTO conducted a sit-in at the office of HUD Secretary Romney (R1-72).* This demonstration led to the convening of a "Conference On Tenants' Rights and Responsibilities" in Washington, D.C. in December 1969 to discuss the NTO demands (A-23).* At that conference there was appointed an *ad hoc* committee chaired by HUD which included representatives of NTO and the National Association of Housing and Redevelopment Officials (NAHRO). The purpose of this *ad hoc* committee or "task force" was to seek agreement on a model lease and grievance procedure for low rent public housing.

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*"A.." refers to the Appendix attached hereto. "R1 or R2" refers to volume 1 or 2 of the Certified Record.

Although between one-third and one-half of all the LHA's in the country belong to NAHRO, neither it nor NTO are legal agents for their members and neither can bind its members.

During 1970 there was a series of meetings of the *ad hoc* committee involving persons from NAHRO, NTO and HUD at which drafts of lease and grievance procedures were exchanged and discussed. NAHRO and NTO representatives reached agreement on a draft in November of 1970 and, after further discussions with some concerned representatives of some LHA's, Circulars 8 and 9 were promulgated by HUD on February 22, 1971 (A-23).

Circular 8 deals directly with leases and was issued by HUD to "implement" so much of the annual contribution contract between each LHA and HUD as provides that no family shall occupy a dwelling in any project "except pursuant to a written lease" (A-11, 12). Circular 8 directs each LHA to incorporate the detailed grievance procedures of Circular 9 into every lease (A-14, R1-101).

These Circulars set forth specific and detailed requirements which must be included in all leases between all LHA's and their tenants including the prescribed grievance procedure for any tenant complaint about any LHA action or failure to act which is deemed to "adversely affect the tenants' rights, duties, welfare or status" (A-16).

Under the Circulars two proceedings would be required before any LHA could obtain relief against any tenant whatever the nature of the dispute. The first hearing would be that directed by HUD in the Circulars before a "hearing panel" or "impartial official". If the LHA prevails, it wins only the right to "pursue its remedies" with the tenant free "to seek appropriate relief." On the other hand, if the tenant wins, the decision is binding on the LHA (A-17).

Prior to the promulgation of Circulars 8 and 9 HUD neither circulated the proposed text to LHA's in the United States for comment, nor published the text, substance or even the subject matter of either Circular in the Federal Register as a matter of proposed regulation (R1-29).

NAHRO did not circulate to its membership the text of either Circular prior to their issuance by HUD. NAHRO did, in a December 21, 1970 bulletin (R1-72), advise its members with respect to the discussions of the *ad hoc* committee but that bulletin did not set forth, even in summary form, the contents of either Circular.

Shortly after issuing Circulars 8 and 9, HUD area offices were told by HUD that they were responsible "for taking action to have LHA's conform to the requirements of the Circulars" (A-19). LHA leases not in conformity with the Circulars were to be "replaced with new leases as soon as the LHA can reasonably be expected to make the necessary modification and arrangements for execution of the new leases" (A-19, 20). Should any local authority refuse or "purposely" fail to implement the Circulars, HUD policy requires that the HUD Area Director "refer the matter to the Regional Administrator" with a recommendation for action to be taken against the local authority "such as withholding funds (other than guaranteed subsidies), referral of the matter to the Department of Justice for action to enforce compliance, or such other action as may be authorized and deemed appropriate" (A-20).

In July, 1971, suit was brought by the plaintiff LHA's on their own behalf and on behalf of all LHA's to enjoin enforcement of the Circulars. They charged that the Circulars violated § 1 of the Housing Act, the "congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects" (*Thorpe* v. *Housing Authority*, 393 U.S. 268, 278

(1969)), that the Circulars were issued in violation of the rule making provisions of the Administrative Procedure Act, impaired LHA's contract rights and were in violation of the requirements of due process.

NTO and various tenant organizations from named plaintiff LHA's projects (hereafter NTO) were given leave to intervene as defendants.

HUD and NTO counterclaimed for enforcement of the Circulars. HUD also argued that LHA's which "refuse to implement these Circulars are failing to perform their obligations under the provisions of the Annual Contributions Contract" (R1-14). As the Court of Appeals held, such a failure entitles HUD to "reduce or terminate" the annual contributions payable to LHA's pursuant to the annual contributions contract or even to "assume management" of LHA's projects (A-35).

HUD and NTO also urged that HUD did not have to comply with the rule making provisions of the Administrative Procedure Act because Circulars 8 and 9 were exempted as relating to "public contracts" within the meaning of Section 4 of that Act.

In December, 1971, while the case was pending in the District Court, all LHA's in Kentucky received a written threat from HUD that modernization funds would not be allocated to any of them that had not adopted the Circulars, and that where such funds had already been allocated, HUD would not approve spending them until the Circulars were adopted (R1-29).

Both sides moved for summary judgment and on February 10, 1972, the District Court granted plaintiffs' motion, denied defendants' motions, declared Circulars 8 and 9 invalid, and enjoined defendants from enforcing them (A-21). HUD and NTO appealed to the United States Court of

Appeals for the Eighth Circuit, which on September 28, 1972, reversed the District Court and remanded with directions to enter summary judgment on behalf of HUD and NTO upholding the validity of the Circulars (A-38, 39).

Both the District Court and the Court of Appeals relied upon this Court's decision in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), to support their decisions. In *Thorpe*, this Court approved a HUD Circular which required only that in eviction cases LHA's informally notify a tenant of the reason for his eviction and give him a chance to reply.

Citing *Thorpe*, the District Court held that the changes wrought in all LHA leases by the Circulars were violative of the Congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects. The District Court held that if a LHA were "required by federal mandate to hold a hearing for every tenant grievance, no matter how insignificant, this would put the federal government in the position of dictating the procedure for part of the day-to-day management of the LHA, which is the problem that was sought to be remedied in the 'local autonomy amendment' " to § 1 of the Housing Act of 1937 (A-9). The District Court did not pass on the wisdom or desirability of the Circulars, or on what specific directives of the Circulars, if any, might be required on due process grounds. Nor did the District Court differ with HUD that the convening of conferences for the discussion of tenant-management problems was a proper function of HUD; that Court said it "only differs with HUD when HUD, instead of advising and making available model programs, turns and orders their implementation upon pain of financial deprivation. Such was never the intent of Congress" (A-10).

The District Court did not pass on the Administrative Procedure Act issue but, citing this Court's opinions in

*Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), and *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), noted: "Congress has seen fit to enact the APA and agencies are not free, as the whim may take them, to ignore its provisions" (A-5).

The Court of Appeals also claimed to be relying on *Thorpe*. On the issue of whether the Circulars violated the congressional mandate that maximum responsibility in the administration of federally financed housing projects be vested in LHA's, the Court of Appeals said there was "little difference between the notice and hearing requirements approved in *Thorpe* • • • and the requirements included in Circular 9", that "Circular 9 does not basically alter the lease", that "the details in carrying out these procedures are left entirely in the hands of LHA's," that the Circulars "do not inject HUD into day-to-day operations" because HUD "has nothing to do with the implementation or detailed operation of the procedural process prescribed", and the "grievance procedures can only be invoked when the local authority is alleged to have violated the actual terms of the lease" (A-29).

Despite the fact that there was no evidence in the record that any group of LHA's, or indeed any LHA, had failed to measure up to the objectives of the Act or was even accused of such a failing, other than a failure to implement the Circulars, the Court said:

> "Although the congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act." (A-33).

The Court of Appeals apparently believed that so much of the purposes and objectives of the Housing Act as are

contained in the congressional mandate that maximum responsibility in the administration of federally financed housing projects be vested in LHA's must give way when HUD determines to make rules pursuant to 42 U.S.C. § 1408 purporting to further other purposes and objectives of the Act:

> "Although a policy declaration as contained in Section 1401 is entitled to judicial respect upon construction of the statute, it cannot restrict an agency's responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408" (A-33).

On the issue of whether the Circulars were invalid because of HUD's failure to comply with the notice provisions of the Administrative Procedure Act, the Court of Appeals reasoned that "the Circulars in question directly supplement the Annual Contributions Contract by imposing additional obligations on the parties", and, since the Annual Contributions Contract between each local authority and HUD "represents a governmental proprietary interest", the Circulars are directly related to "public contracts" and therefore their issuance was exempted from the rule making provision of the Administrative Procedure Act (A-35, 36).

On the "impairment of contracts" issue, the Court noted that HUD had not yet "approved the withholding of any funding", that "withholding of funds is only one possible means of enforcement" and concluded that, there being no "threatened loss of funds for failure to comply with Circulars 8 and 9, the issue of contract impairment at this time is purely hypothetical" (A-37).

The Court below, although holding that the Circulars do impose "additional obligations on the parties" to every annual contribution contract, held that the Circulars did not "unlawfully alter" those contracts (A-37, fn. 17).

## REASONS FOR GRANTING THE WRIT

### 1. The Decision of the Court of Appeals Presents Important Questions Of Federal Law Which Should Be Settled By This Court.

Before the courts below were, as plaintiffs, a class consisting of all of the LHA's managing federally financed housing projects in the United States, and, as defendants, HUD, the federal agency responsible for public housing, and an organization claiming to represent all of the tenants in public housing, NTO. The questions involved relate to whether HUD's power to make rules for LHA's is limited by Section 1 of the Housing Act and whether HUD may issue rules applicable to all LHA's without complying with the notice provisions for rule making pursuant to Section 4 of the Administrative Procedure Act. As the Court of Appeals notes (A-28), although decisions from another circuit and from two State Supreme Courts have given "tacit approval" to the Circulars in eviction cases involving only one housing authority and one tenant, the "precise question" presented by this case was not passed upon.

Although we will show that the decision of the Court of Appeals is inconsistent with decisions of this Court, the important matters presented directly by this case should be settled by this Court. This factor alone justifies the grant of certiorari to review the judgment below.

### 2. The Court of Appeals Decided Important Federal Questions In A Way Which Conflicts With Decisions Of This Court And Other Courts of Appeal.

#### (a) On The Issues Of The Power Of HUD And Contract Impairment, The Court of Appeals Did Not Follow Thorpe v. Housing Authority, 393 U.S. 268 (1969).

This Court in *Thorpe* considered the power of HUD to issue a Circular which imposed in eviction cases "only one

requirement: that the [LHA] comply with a very simple notification procedure before evicting its tenants" (393 U.S. at 278). That single requirement was that "no tenant be given notice to vacate without being told by the [LHA], in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish" (393 U.S., fn. 8 at 273). The *Thorpe* Circular was held *not* to violate "the congressional policy of allowing [LHA's] to retain maximum control over the administration of federally financed housing projects" (393 U.S. at 278). The *Thorpe* Circular also was found *not* to constitute an "unauthorized and unconstitutional impairment" either of the LHA's annual contribution contract with HUD or of the lease between the LHA and its tenants (393 U.S. at 274).

The opinion of this Court in *Thorpe* spelled out guidelines for resolving issues such as those at hand which were disregarded by the Court of Appeals. The reasons why this Court found the HUD Circular before it in *Thorpe* to be lawful show why the Court of Appeals should have affirmed the District Court's ruling that Circulars 8 and 9 are unlawful.

Unlike the *Thorpe* Circular's one simple requirement for eviction cases, Circulars 8 and 9 do not leave untouched any aspect of the operation of federally financed housing projects and relations between LHA's and their tenants. Every lease of every LHA must be amended to provide that whenever any LHA action or failure to act involving interpretation or application of any of its "regulations, policies or procedures" is deemed by any tenant to affect his "rights, duties, welfare or status", a "hearing panel" must be convened which is empowered to resolve the matter by a decision which is binding upon the LHA if it loses but which does *not* bind the tenant if he loses. When an LHA wins it must then pursue its remedies in court.

The Court below ignored the text of the *Thorpe* Circular and of Circulars 8 and 9 when it held: "there exists little difference between the notice and hearing requirements approved in *Thorpe* • • • and the requirements included in Circular 9" (A-29). The Circular in *Thorpe* provided for an informal notification procedure prior to eviction proceedings; the Circulars at hand impose the requirement for formal hearings with respect to any tenant complaint about anything and impose upon LHA's the need for two hearings before any relief can be had against any tenant.

In *Thorpe,* this Court held:

> "Given the admittedly insubstantial effect this requirement has upon the basic lease agreement under which the Authority discharges its management responsibilities, the contention that the circular violates the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects is untenable." (393 U.S. at 278).

The *Thorpe* Circular also was said to leave the lease between the LHA and tenant "inviolate" (393 U.S. at 279). Circulars 8 and 9, however, were intended to "violate" every LHA lease. The expressed purpose of HUD in issuing the Circulars was to effect no less than a fundamental rearrangement of the relations between each LHA and its tenants by the mandatory incorporation of sweeping changes into every lease and HUD directed that all leases be replaced as soon as possible (A-11, 15, 16).

In *Thorpe,* the Circular was unrelated to the annual contributions contract: "The respective obligations of both HUD and the [LHA] under the annual contributions contract remain[ed] unchanged" (393 U.S. at 279). Accordingly, in *Thorpe* there was no merit in the claim of "contract impairment". Circulars 8 and 9, if upheld, dras-

tically change every LHA's obligations under its annual contributions contract with HUD. Circular 8—which requires each LHA to incorporate into its leases the provisions of Circular 9—is said by HUD to be issued to "implement" the standard provision of every annual contributions contract (providing for written leases, conforming to the Act and other contract provisions, termination for cause and the simple notice requirement approved in *Thorpe* (A-11, 12)), *and* HUD argues that LHA's refusing "to implement these Circulars are failing to perform their obligations under the provisions of the Annual Contributions Contract" (R1-14) thus entitling HUD to repudiate its obligations under that contract.

In *Thorpe,* HUD was not a party and, on the issue of contract impairment, this Court said:

> "A far different case would be presented if HUD were a party to this suit arguing that it could repudiate its obligations under the annual contributions contract because the [LHA] had failed to apply the circular." (393 U.S. at 279 fn. 33.)

This case is the very "far different case" anticipated by this Court in *Thorpe.* HUD is a party and is arguing that it can repudiate its obligations under the annual contributions contract to those LHA's which fail to implement the Circulars. Thus it is clear that HUD, in violation of rights vested in all LHA's by reason of the Fifth Amendment, is acting contrary to the constitutional prohibition against the impairment of contracts. *Lynch* v. *U.S.,* 292 U.S. 571, 579 (1934), *Thorpe* v. *Housing Authority,* 393 U.S. 268, 278, 279 (1960).

In *Thorpe* this Court noted that if the procedure followed by LHA's in eviction cases proved inadequate, "HUD may well decide to provide for an appropriate hearing" (393 U.S. fn. 48 at 284). What the Court of Appeals has approved

is a HUD ordered hearing for any matter at all, a procedure requiring *two* hearings before any LHA can obtain relief about anything. To evict, for example, LHA would first have to prevail before the "hearing panel"; only then would it be free "to pursue its remedies" in state courts (A-17). The Circulars require two hearings to collect for a broken window or to enforce a pet regulation.

The failure of the Court below to follow the reasoning and principles set forth by this Court in *Thorpe* v. *Housing Authority,* 393 U.S. 268 (1969), justify the grant of certiorari to review the judgment below.

**(b) On The Issue Of Whether HUD Was Bound By The Rule Making Provisions Of The Administrative Procedure Act, The Court of Appeals Did Not Follow The Decisions Of This Court In Thorpe v. Housing Authority, 393 U.S. 268 (1969), Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969), And Its Decision Conflicts With That Of Other Courts Of Appeal.**

The Court below recognized that the "public contracts" exemption from the notice provisions of the Administrative Procedure Act only applies when (1) the "excepted subjects" are "directly involved" and (2) when the government has a "proprietary" interest (A-35). Its holding that both conditions were met conflicts with applicable decisions of this Court and other courts of appeal.

Thus, *Thorpe* is cited for the proposition that the "Circulars *directly* supplement" (emphasis added) the annual contribution contract (A-36), i.e., the Circulars *directly* involve a public contract. What this Court said in *Thorpe* relevant to the issue of whether HUD Circulars *directly* involve annual contribution contracts was:

> "The respective obligations of both HUD and the Authority under the annual contributions contract remain

> unchanged. Each provision of that contract is as enforceable now as it was prior to the issuance of the circular. Although *the circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's wholly independent rule-making power*" (393 U.S. at 279.) (Emphasis added).

Thus, one reason why the public contracts exception is not applicable to HUD's general circulars is because, at best, annual contributions contracts are only *indirectly* involved,* in the "sense" that an additional obligation is sought to be imposed on LHA's under HUD's "wholly independent rule-making power."

But there is a second test to be met—whether HUD, when it issued the Circulars, was acting in its "proprietary" capacity, was dealing with the government's "internal affairs" such as fixing the "terms and conditions under which the Government will permit goods to be sold to it". *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129 (1940). Obviously it was not. As was said in *Thorpe*, rules of general application for all LHA's in HUD Circulars are imposed under "HUD's wholly independent rule-making power." Congress, when it mandated that "maximum control over the administration of federally financed housing projects" be left with LHA's, left no doubt that the operation of such projects was *not* to be deemed an "internal affair" of the government.

In holding that HUD, when it issues rules of general application such as Circulars 8 and 9, is not bound by the notice provisions of rule making, the Court of Appeals did not follow *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759

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* Of course, if the HUD Circulars are deemed to *directly* involve annual contribution contracts, the contract impairment issue rises as a bar: the "public contracts" exception to the notice provisions for rule making is not a grant of power to change contracts at will.

(1969). The plurality opinion in that case, in which Chief Justice Warren and Justices Stewart and White joined, held that the notice requirements of the Act for rule making were designed to assure "fairness and mature consideration of rules of general application" such as Circulars 8 and 9 and that "there is no warrant in law for the [agency] to replace the statutory scheme with a rule-making procedure of its own invention" (394 U.S. at 764). Although dissenting, Justice Douglas agreed with that principle:

> "The rule making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard * * * Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders, and often benefit from that advice * * * Public airing of the problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us" (394 U.S. at 777-8).

Justice Harlan, although also dissenting, joined with Justice Douglas and the plurality opinion on the importance of the notice requirements in rule making when he stated that it is "precisely in these situations in which 'established patterns of conduct are revolutionized, that rule making procedures perform the vital functions' " described by Justice Douglas (394 U.S. at 781).

The Court below suggests (A-36) that *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2nd Cir. 1971), and *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970), support its decision. These cases held that a general notice of rule making need not be published where all that is involved is a rent increase for one project and obviously have no bearing where, as here, HUD has issued rules binding on all LHA's.

Typical of decisions from other Circuits which follow the principles set forth in *Wyman-Gordon* which were ignored by the Court of Appeals is *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740, 744 (3rd Cir. 1969), where the Court set aside orders of the Federal Power Commission for failure to comply with the notice provisions of the Administrative Procedure Act stating:

> "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated. See Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir.), cert. den. 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965). These procedures must be followed when an agency is exercising its legislative function in order that its rules have the force of law. Cf. N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709, where the plurality opinion used this language:
>
> " 'The rule-making provision of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H.R.Rep. No. 1980, 79th Cong., 2d Sess., 21-26 (1946); S.Rep. No. 752, 79th Cong., 1st Sess., 13-16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The 'rule' created in *Excelsior* was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the 'hearing,' whereas

> notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule-making.'"

The failure of the Court below to follow the above decisions of this Court and its conflict with the decisions of other Circuits on the Administrative Procedure Act issue justify the grant of certiorari to review the decision below.

### 3. The Decision Of The Court Of Appeals Is Such As To Require The Exercise Of This Court's Power Of Supervision.

The Court of Appeals based its decision on premises having no foundation in reality. Thus it said that "Circular 9 does not basically alter the lease" (A-29); as we have seen, by reason of Circular 8, the provisions of Circular 9 are required to be incorporated into every lease and those provisions basically alter each lease. The Court of Appeals said that "grievance procedures can only be invoked when the local authority is alleged to have violated the actual terms of the lease" (A-29); as we have seen, the grievance procedures, by their terms, are applicable with respect to *any* tenant complaint about *any* local housing authority action or failure to act which is claimed to "adversely affect the tenant's rights, duties, welfare or status" (A-16). The Court of Appeals said that HUD "has nothing to do with the implementation of detailed operation of the procedural process prescribed" (A-29), overlooking the fact that it is the intervention of "hearing panels" and "impartial officials" into LHA operations by *order* of HUD which violates Section 1 of the Housing Act. There was no claim below that HUD would have anything to do with the procedural processes it ordered. The argument was that the

ordering of that process violated Section 1 of the Housing Act. Petitioners submit that the Court of Appeals for the Eighth Circuit could not have reversed the decision of the District Court if it considered the actual facts before it.

Finally, the Court of Appeals passed over in silence additional serious objections to the actions of HUD. Although conceding the unusual procedure adopted by HUD in acting through an *ad hoc* committee (A-23), the Court had nothing to say about petitioners' argument that, quite apart from the Administrative Procedure Act issue, petitioners were denied procedural due process because HUD's unique procedures with respect to Circulars 8 and 9 "offend against the concept of fair hearing" *American Airlines Inc.* v. *C.A.B.*, 359 F.2d 624, 632 (D.C. Cir. 1966). Nor did the Court consider petitioners' argument that the Circulars constitute a delegation to "hearing panels" and "impartial officials" under circumstances which constitute "delegation running riot" "clearly violative of the due process clause of the fourteenth amendment." *Housing Authority of Woonsocket* v. *Fetzik*, 289 A.2d 658, 662-3 (R.I., 1972); *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495, 551, 553 (1935); *Yakus* v. *United States*, 321 U.S. 414 (1944).

## CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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## INDEX TO APPENDIX


| | PAGE |
|---|---|
| Memorandum of U.S. District Court For The District of Nebraska of February 10, 1972 | A-1 |
| Order of U.S. District Court For The District of Nebraska of February 10, 1972 | A-21 |
| Opinion of The Court of Appeals For the Eighth Circuit of September 28, 1972 | A-22 |
| Appellees' Petition For Rehearing And Suggestion of In Banc Rehearing | A-40 |
| Order of October 26, 1972 Denying Petition for Rehearing | A-57 |

HOUSING AUTHORITY OF the CITY OF OMAHA, NEBRASKA, et al., Plaintiffs,

v.

UNITED STATES HOUSING AUTHORITY, etc., et al., Defendants,

National Tenants Organization, Inc., et al., Intervenors.

Civ. No. 71-O-287.

United States District Court,
D. Nebraska.
Feb. 10, 1972.

## MEMORANDUM

DENNEY, District Judge.

This matter comes before the Court on motion of the plaintiffs for summary judgment [Filing #30], on motion of the defendants to dismiss, or, in the alternative, cross-motion for summary judgment [Filing #36], and on motion of the intervenors for cross-motion for summary judgment and for a preliminary injunction [Filing #35]. In addition, there have been filed three requests for exclusion from the class represented by plaintiffs [Filings #29, #32, #33].

Plaintiffs are Local Housing Authorities (hereafter LHA) created by local authorities and operating low rent public housing programs in various cities throughout the United States. One of the defendants is the United States Housing Authority, which was created in original Housing Act of 1937, 50 Stat. 888, 42 U.S.C.A. § 1401 et seq., but whose functions in subsequent years were transferred to other agencies or consolidated in the Department of Housing and Urban Development (hereafter HUD) and which finally ceased to be a body corporate with perpetual duration in 1968, 82 Stat. 610, amending 42 U.S.C.A. § 1403.

However, the other defendant is properly pleaded and is George Romney, Secretary of HUD, the agency of the United States charged with the responsibility of implementing the Federal low-rent housing programs. Intervenors are the National Tenants Organization, Inc. (hereafter NTO) and numerous local tenants organizations throughout the United States.

On February 22, 1971, HUD issued and served upon the LHA's Circulars RHM 7465.8 and 7465.9 (hereafter Circulars 8 and 9). On May 7, 1971, HUD transmitted to departmental, regional and field offices RM 7465.1 Supp. 2 (hereafter Supp. 2) which contained certain directives regarding the implementation of Circulars 8 and 9. Plaintiffs seek herein that the Court declare Circulars 8 and 9 unlawfully issued and invalid and that the Court enjoin any attempted enforcement of Circulars 8 and 9 by threatened withholding of funds, or otherwise.

Plaintiffs contend that Circulars 8 and 9 are unlawful because the proper administrative procedure was not followed in their promulgation. According to plaintiffs, the proper procedure was that provided in the Administrative Procedure Act (hereafter APA), 5 U.S.C.A. 500 et seq. Plaintiffs also allege that the circulars are invalid because they violate the express limitations of the power of HUD as set forth in the amendment of 1959, 73 Stat. 679, amending 42 U.S.C.A. § 1401. Defendants' threatened withholding of funds is alleged by plaintiffs to violate the Annual Contributions Contract (hereafter ACC).

Defendants argue that the HUD circulars were issued in compliance with procedural due process and did not violate APA requirements. Defendants also contend that the HUD circulars were validly issued in accordance with HUD's statutory authority, and that they do not exceed the provisions of the ACC.

Intervenors contend that the issuance of Circulars 8 and 9 are a valid exercise of HUD's power and that the circulars are in accord with the provisions of the ACC. According to defendants, the circulars were validly issued under the APA, although defendants contend HUD was not required to comply with the APA.

The Court will not be required to reach either the APA or the ACC issue, in view of its ruling on the question of the scope of HUD's power; however, it will comment briefly on the APA question later in this opinion.

Initially, the Court must rule as to whether the prerequisites to a valid class action under Rule 23 of the Federal Rules of Civil Procedure have been met.

[1, 2] The Court finds that requirements (1)–(3) of Rule 23(a) are met, which leaves for discussion the requirement of Rule 23(a) (4), that "the representative parties will fairly and adequately protect the interests of the class." It is evident herein from the requests for exclusion that at least a few of the members of the alleged class of plaintiffs are quite satisfied with the HUD circulars. The question is, will such a divergence of desire in respect to the result the Court might reach cause the representation requirement not to be met. The 8th Circuit has recently stated the requirement as "representation is insufficient under Rule 23(a) when there is antagonism between the representative party and the class *'as to the subject matter of the suit.'"* Arkansas Ed. Ass'n. v. Board of Ed., Portland, Ark. Sch. Dist., 446 F.2d 767 [8th Cir. 1971]. The situation herein is similar to the example cited with approval by the 8th Circuit in that case, that of where a fund is present which is insufficient to pay all the beneficiaries and thus each beneficiary has divergent views as to the result the Court should reach in that how much each should be paid. The representation requirement is met, it being the preservation of the

fund that is the prime jurisdictional consideration. It appears to the Court that here the subject matter of the suit is the HUD circulars, which is altogether different than the hoped for result of the lawsuit. Here, it is the HUD circulars that are the prime jurisdictional consideration, thus the representation test as given by the 8th Circuit is met, and all those affected by those circulars constitute a proper class under Rule 23(a). Other courts have held specially on this point that the fact that some of the members of the class are satisfied with the action complained of is irrelevant. *See* e.g., Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 [2nd Cir. 1968]. The question remains as to what type of class action of Rule 23(b) has been alleged. Examining the various classes under Rule 23(b), the Court concludes that this action is most properly brought under Rule 23(b) (2), a class action where "the party opposing the class has acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." Exclusion is not permitted in Rule 23(b) (2) class actions, 3B Moore's Federal Practice ¶ 23.55. Therefore, the motions for exclusion from the class action should be overruled.

[3] In approaching the cross motions for summary judgment, the Court recognizes that under Rule 56 of the Federal Rules of Civil Procedure, "[t]he function of the summary judgment is to avoid a useless trial; and a trial is not only not useless but absolutely necessary where there is a genuine issue as to any material fact." 6 Moore's Federal Practice ¶ 56.15 1.–0. It appears there is certainly an issue of material fact remaining in the APA question, that of whether or not the plaintiffs had actual notice of the attempted rule making by HUD. Similarly, there appear to be issues of material fact remaining surrounding the ACC issue. However, the Court finds that there are no issues of material fact remaining as to the question of the

power of HUD to issue the circulars attacked herein and the Court should not flinch from its duty of granting summary judgment merely because a difficult question of law is presented.

[4] However, first the Court would like to comment briefly on the APA question. The uncontroverted facts show that HUD did not publish general notice of the proposed rule making in the Federal Register before the circulars were issued, as required by 5 U.S.C.A. § 553(b). Defendants and intervenors argue that (1) HUD was not required to follow such procedure because of § 553(a) (2) which exempts "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or *contracts.*" (emphasis added) and (2) that in any event HUD is exempted because § 553(b) does not require published notice to those persons having actual notice. The Court does not comment on this latter contention, (2), for the reason previously discussed. However, as to (1), it is the firm belief of this Court that the "contract" exemption of the APA was never intended to be used by agencies to escape the procedural requirements of the APA where the rule making involved has the broad substantive impact demonstrated by the circulars herein. The fact of the matter is that HUD discharges its responsibilities set out in 42 U.S.C.A. § 1401 et seq., in this area of low-rent housing largely by inclusions in the ACC. However, the Supreme Court has spoken on this matter and if the NLRB cannot make prospective rules by use of adjudicatory proceedings, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed. 2d 709 [1969], then this Court is of the opinion that HUD should not be able, in the name of the contract exemption, to make rules that have not only prospective effect but, according to recent decisions, *see* e.g., Thorpe v. Housing Authority, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 [1969], retroactive effect as well. Congress has seen fit to enact the APA, and agencies are not free, as the whim may take them, to ignore its provisions.

## DID HUD HAVE THE POWER TO PROMULGATE CIRCULARS 8 AND 9?

Passing now to the major problem in this matter, the Court begins by saying it appears that the law to be applied is contained in the *Thorpe* case. The conflict that has arisen is between the declaration of Congressional policy embodied in the amendment of 1959, 73 Stat. 679, amending 42 U.S.C.A. § 1401, which is known as the "local autonomy amendment," and the broad regulatory powers contained in 42 U.S.C.A. § 1408. 42 U.S.C.A. § 1401 provides in part that:

> It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies.

42 U.S.C.A. § 1408 provides that:

> The Authority may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter.

This conflict was recognized in *Thorpe, supra,* at p. 277, 278, 89 S.Ct. at p. 524, wherein another HUD circular was tested. That particular circular required the LHA to provide each tenant "with a very simple notification procedure before evicting its tenants." The Supreme Court struck the balance between the two statutes by citing with approval what the circular did not do, saying:

> *"It does not . . . purport to change the terms of the lease provisions used by Housing Authorities,* nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms

> of the lease and the pertinent provisions of the State law relating to evictions. It does not deal with what reasons are acceptable to HUD . . . . Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease." (Emphasis added) (Footnotes omitted)

The Supreme Court then concluded that as such the circular had an insubstantial effect upon the basic lease agreement and the Congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects was not violated. From the language used by the Supreme Court, it appears that if the circulars at issue do purport to change the terms of the basic lease agreement then they are violative of the Congressional policy. There remains but to examine the circulars themselves. But first the Court notes that it has examined the three cases of which it is aware that have dealt with the circulars in question. In Glover v. Housing Authority of City of Bessemer, Ala., 444 F.2d 158 [5th Cir. 1971], the question of the validity of the circulars was not presented and instead the Court focused on whether they were to be retroactively applied. In Chicago Housing Authority v. Harris, 275 N.E.2d 353, the Illinois Supreme Court based its conclusion of validity on the fact that plaintiff failed to demonstrate any specific infringements of the lease agreement and that the tenant must still pay rent and conform to other lease provisions. The infringements of the lease agreement will be discussed later in this memorandum. The Court submits that the test of *Thorpe* is not that the tenant must still pay rent and conform to other lease provisions. In Housing Authority of the City of Milwaukee v. Mosby, 192 N.W.2d 913, the Supreme Court of the State of Wisconsin did not dwell on the validity of the circulars but concluded that Circular 9 did not change the terms of the lease. This Court would tend to agree, it being Circular 8

that is required to be incorporated into the lease. Circular 9 will be discussed separately herein. That Court also felt that the pressing issue was that of retroactivity. For these reasons, the Court has found these decisions to be of little assistance, which has necessitated an in-depth reexamination of *Thorpe*.

Circular 8 is set out in Appendix A, but among its provisions are that dwelling leases must include (a) that management will accept rental payments without regard to other charges owed by the tenant to management, (b) the process by which rents and eligibility for occupancy is redetermined, (c) the use of separate legal process to collect monetary claims for damages, and (d) that tenant grievances shall be resolved in accordance with LHA procedures consistent with HUD regulations covering such procedures.

Circular 9 is set out in Appendix B, but basically it provides for LHA's to adopt grievance procedures, including a hearing for all tenant grievances and that the decision of the official or panel that conducts the hearing shall be binding on the LHA but not upon the tenant.

Supp. 2 is set out in Appendix C and it deals with implementation of the lease and grievance procedures. It states in part that shou'd the LHA's refusal to implement Circulars 8 and 9, the Regional Administrator may recommend withholding of federal funds (other than guaranteed subsidies) until compliance is had.

[5] It is apparent from the evidence that the provisions of Circular 8 are not now contained in the basic lease agreement of the plaintiff LHA's. It would seem that, applying the test of *Thorpe*, the terms of the basic lease agreement are being varied and thus the Congressional policy is violated.

The evidence also indicates that the LHA's do not presently employ the grievance procedures of Circular 9. The

legislative history of the local automony amendment indicates that it was designed to take the federal government out of dictating day to day management of the LHA. 105 Cong.Rec. 1869-1870 [1959] (remarks of Senators Clark and Proxmire). It appears to the Court that, if the LHA were to be required by federal mandate to hold a hearing for every tenant grievance, no matter how insignificant, this would put the federal government in the position of dictating the procedure for part of the day to day management of the LHA, which is the problem that was sought to be remedied in the "local autonomy amendment." It follows that the Congressional policy will be violated if Circular 9 is allowed to stand.

The Court is aware that in footnote 48 to *Thorpe* it is stated that "if the procedure (the simple notification of eviction) followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing." This Court is of the opinion that it is proper for HUD to make such a decision; however, it is also of the opinion that to implement such a decision by way of a mandatory circular would require Congressional approval, in the face of the "local automony amendment."

[6] Being violative of the Congressional policy embodied in the "local autonomy amendment", this Court has no choice but to enjoin implementation of Circulars 8 and 9 as an invalid exercise of the power of HUD.

This ruling obviates the necessity of ruling on Supp. 2, but the Court feels that the result in such a case was foreshadowed also in *Thorpe, supra,* at footnote 33, where the Supreme Court stated that:

> A far different case would be presented if HUD were a party to this suit arguing that it could repudiate its obligations under the annual contributions contract because the Authority had failed to apply the circular.

It must be noted that the Court does not pass upon the wisdom nor the desirability of the provisions contained in Circulars 8 and 9. It may well be that they are needed from a standpoint of national uniformity. It might also be that were the requirements contained in the circulars solely before the Court on due process grounds, the Court might find many of them required. The circulars themselves and the Model Lease and Grievance Procedures accompanying them were developed from a series of meetings chaired by HUD during which representatives of HUD, NRO, NTO and other invited parties discussed many of the recurring tenant/management problems. The Court is of the opinion that such conferences are properly one of the functions of HUD and the sort of activity where HUD can be very productive. The Court only differs with HUD when HUD, instead of advising and making available model programs, turns and orders their implementation upon pain of financial deprivation. Such was never the intent of Congress.

An order pursuant to this Memorandum will be entered this date.

## APPENDIX A

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT RENEWAL AND HOUSING MANAGEMENT

CIRCULAR

RHM 7465.8
2/22/71

Cancellation
Date:

SUBJECT: Requirements and Recommendations To Be Reflected in Tenant Dwelling Leases for Low-Rent Public Housing Projects

1. PURPOSE. To set forth standards and criteria of management-tenant relationships to be embodied in dwelling leases in the low-rent public housing program.

2. BACKGROUND.

a. *The traditional landlord-tenant relationship* has been substantially changed in recent years by State statutes in many states as well as by a long series of legal decisions. This has been particularly true in public housing, the courts indicating that Local Housing Authorities have certain duties and obligations which cannot be avoided or circumvented by contractual provisions in leases with tenants. In line with these decisions and as a result of extensive discussions involving organizations representing Local Housing Authorities and tenants, HUD recently issued Circular RHM 7465.6, dated 8-10-70, prohibiting the inclusion in public housing leases of certain unfair or unreasonable provisions.

b. *Agreement was also reached* regarding the provisions that should be included in such leases to reflect the obligations, responsibilities, and duties of both management and tenants. It was the belief of all the participants in such discussions that leases which reflect the obligations imposed upon public landlords by the courts, and the correlative obligations of tenants, would improve management-tenant relationships and promote an improved housing environment to the advantage of the low-rent housing program, its beneficiaries, and the communities in which such housing is located.

3. REQUIREMENTS.

a. *The Annual Contributions Contract* between a Local Housing Authority and HUD provides in Part II, Section 203(B):

"The Local Authority shall not permit any family to occupy a dwelling in any Project except pursuant to a writ-

ten lease for such dwelling executed by a responsible member of such family, which lease shall contain all relevant provisions necessary to meet the requirements of the Act and of this Contract, and which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause. In terminating a tenancy, the Local Authority shall inform the tenant in a private conference or other appropriate manner the reasons for the eviction and give the tenant an opportunity to make such reply or explanation as he may wish."

b. *To implement this provision of the Contract,* all such dwelling leases shall include provisions covering:

(1) Names of the parties to the lease and the identification of the premises leased.

(2) The amount and due date of rental payments, and a proviso that management will accept rental payments without regard to any other charge owed by the tenant to management.

(3) The utilities and quantities thereof to be furnished to the tenant by management.

(4) The process by which rents and eligibility for occupancy shall be determined and redetermined including:

(a) The frequency of such rental and eligibility determinations.

(b) The information which the tenant shall supply to permit such determinations.

(c) The standards by which rents, eligibility, and appropriate dwelling unit size shall be judged.

(d) The circumstances under which a tenant may request a redetermination of rent.

(e) The effect of misrepresentation by the tenant of the facts upon which rent or eligibility determinations are based.

(f) The time at which rent changes or notice of ineligibility shall become effective.

(5) The limitation upon the tenant of his right to the use and occupancy of the dwellings.

(6) The responsibilities of the tenant in the maintenance of his dwelling and such other project areas as may be assigned to him for maintenance and upkeep, if any; and his obligations for intentional or negligent failure to do so.

(7) The use of separate legal process to collect monetary claims for damages.

(8) The responsibility of management to maintain the buildings and any unassigned community areas in a decent, safe, and sanitary condition in accordance with local housing codes and HUD regulations, and its obligations for failure to do so.

(9) The responsibility of management to provide the tenant with a written statement of the condition of the dwelling unit (when the tenant initially enters into occupancy and when he vacates the dwelling unit), and the conditions under which the tenant may participate in the inspection of the premises which is the basis for such statement.

(10) The circumstances under which management may enter the premises during the tenant's possession thereof.

(11) The formalities that shall be observed by management and tenant in giving notice one to the other as may be called for under the terms of the lease.

(12) The circumstances under which management may terminate the lease, all limited to good cause, and the length

of notice required for the tenant to exercise his right to terminate.

(13) The agreement that any tenant grievance or appeal from management's decision shall be resolved in accordance with LHA procedures consistent with HUD regulations covering such procedures.

(14) The usual signature clause attesting that the lease has been executed by the parties.

c. *No lease shall contain language* which establishes less than the minimum responsibilities and obligations on each of the parties as provided in the model lease shown as Appendix 1, with respect to the above required provisions.

d. *These provisions shall not apply* to leased housing units.

4. RECOMMENDATIONS.

a. *Security deposits* when required by LHAs should be limited to an amount not in excess of one month's rent, or some reasonable set amount. Provision should be made for the gradual build up of such security deposit; and any interest earned upon such security deposit should be considered money due to the tenant upon vacation of the premises less any amounts owing to management. Management should consult with tenants concerning an appropriate depository for such funds.

b. *Penalties for late payments for rent* are no longer assessed by many LHAs. Since such penalties have proved ineffective in improving rent collections and tend to exacerbate tenant-management relationships, it is strongly urged that they not be imposed.

## APPENDIX B

## U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT RENEWAL AND HOUSING MANAGEMENT

CIRCULAR

RHM 7465.9
2/22/71

Cancellation
Date:

SUBJECT: Grievance Procedures in Low-Rent Public Housing Projects

1. PURPOSE. To set forth requirements and recommendations for grievance procedures to be established by all local housing authorities.

2. BACKGROUND. In recent years, it has become more and more apparent that many of the problems faced by management and tenants in low-rent public housing have resulted in friction and strain in tenant-management relations and in litigation, costly to both management and tenants; much of which might have been avoided had some kind of procedure been available for grievances to be aired before an impartial individual or panel. Some of these problem areas are the examination of incomes to determine rents, the re-examination of incomes to determine eligibility for continued occupancy, the inspection of units to determine their condition, the imposition of lease restrictions to protect project property, the procedures used to collect rents or evict families, and procedures to collect costs for repairs for damages to dwelling units or other project areas. In seeking solutions to these problems, HUD has brought together representatives of the local housing authorities, tenants, and professional arbitrators, and other interested organizations for a discussion of issues and approaches to tenant-manegement problems. After a series

of meetings and extensive discussions regarding a lease and a grievance procedure applicable for use in the low-rent public housing program, it was agreed by the participants that establishment of a grievance procedure by every local housing authority, embodying certain standards and criteria, would improve management-tenant relationships and promote improved housing environment to the advantage of the low-rent public housing program thus implementing the national housing policy as expressed by Congress; and that provision for a grievance procedure should be included in all low-rent public housing leases. This is now required by Circular RHM 7465.8.

3. REQUIREMENTS. Each local housing authority shall adopt procedures or revise existing grievance procedures to embody, as a minimum, the following standards and criteria:

a. A tenant shall be afforded an opportunity for a hearing before an impartial official or a hearing panel if he disputes within a reasonable time any LHA action or failure to act in accordance with the lease requirements, or any LHA action or failure to act involving interpretation or application of the LHA's regulations, policies or procedures which adversely affect the tenant's rights, duties, welfare or status.

b. If it is determined by an LHA that a hearing panel shall be established, then the number of members on such hearing panel shall be an uneven number, provided that if LHA representatives are appointed as members of such hearing panel, then tenants shall be represented on the panel in equal number by tenants elected by the tenant body, with an impartial member appointed as a tie breaker.

c. If the tenant requests a hearing, the LHA shall notify him within a reasonable time prior to the hearing of the complete grounds or reasons for the LHA's disposition of the tenant's complaint or grievance.

d. The tenant shall be given notice of any rules and regulations governing the hearing within a reasonable time prior to the hearing.

e. The tenant shall be afforded an opportunity to present his side of the dispute, including the opportunity to be represented by counsel or another person of his choice, to bring in witnesses and to confront and cross-examine witnesses in appropriate circumstances.

f. When a decision is made, the official or panel that conducts the hearing shall notify the parties to the dispute in writing of the decision and the reasons and evidence relied on.

g. To the extent that the decision is not inconsistent with state law, the United States Housing Act of 1937, as amended, HUD regulations and requirements promulgated thereunder or the Annual Contributions Contract the decision shall be binding on the LHA, unless the LHA shall determine and notify the complainant in writing within thirty days of such decision that the hearing panel as acted arbitrarily or exceeded its authority. In such event the matter may be subject to judicial review.

h. If the decision is in favor of the LHA or if the hearing panel elects not to act upon the complaint because the issue has already been decided in favor of the LHA in hearings of other complaints based on essentially the same set of facts, the LHA shall be free to pursue its remedies and the tenant may seek appropriate relief.

4. ADMINISTRATIVE EXPENSES.

The LHA shall provide such space, secretarial service, and funds for administrative expenses as are reasonably necessary to accomplish the purposes of the grievance pro-

cedure, the costs of which shall be included as an operating expenditure in the annual operating budget submitted to HUD. This may include reasonable reimbursement for out-of-pocket expenses for attendance at hearing meetings by panel members.

5. MODEL GRIEVANCE PROCEDURE. Appendix 1 is a Model Grievance Procedure which embodies the requirements set forth above. It may be adapted to reflect the local situation and any applicable requirements of state law. The locally adopted Grievance Procedure may include applicants as well as tenants and may be adopted by an LHA for applicants as well as tenants.

# APPENDIX C

## INCOME LIMITS, RENTS, AND OCCUPANCY HANDBOOK

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## IMPLEMENTATION OF MODEL LEASE AND GRIEVANCE PROCEDURES

1. PURPOSE. To prescribe responsibilities of the Area Office in the implementation of Circular RHM 7465.8, Requirements and Recommendations to be Reflected in Tenant Dwelling Leases for Low-Rent Public Housing Projects, and Circular RHM 7465.9, Grievance Procedures in Low-Rent Public Housing Projects, both dated February 22, 1971.

2. AREA OFFICE RESPONSIBILITY

a. The Chief, Housing Management and Tenant Services Branch (HMTS) is responsible for taking action to have LHAs conform to the requirements of the Circulars.

b. The HMTS Branch should take affirmative action to see that LHAs do not delay implementation of the Circulars. The staff should encourage LHAs to act promptly and assist LHAs, if requested, to adapt the model documents to reflect local conditions or the requirements of State law.

c. Every effort taken to have an LHA act promptly to conform to the requirements of the Circulars shall be fully documented in the event it becomes necessary to support a recommendation for action to be taken against the LHA pursuant to paragraph 4 below. In addition, documentation should be made of activities of the LHA to implement the Circulars.

3. TIMING OF IMPLEMENTATION BY LHAs

a. LHA leases which do not conform to the requirement of Circular RHM 7465.8 should be replaced with new leases

as soon as the LHA can reasonably be expected to make the necessary modifications and arrange for execution of the new leases.

b. It is intended that the grievance procedure should be applicable in respect to a grievance or complaint which is unresolved at such time as a grievance procedure is adopted by an LHA or which occurs thereafter. For this reason, activities taken by LHAs to delay the adoption of grievance procedures should be strongly discouraged by the HMTS staff.

4. HUD ACTION FOR FAILURE OF LHA TO IMPLEMENT. If the Area Director determines that an LHA is refusing or purposely failing to implement the Circulars, he shall refer the matter to the Regional Administrator, with a statement of the basis of his determination and any supporting information or records, and recommend action to be taken against the LHA, such as withholding funds (other than guaranteed subsidies), referral of the matter to the Department of Justice for action to enforce compliance, or such other action as may be authorized and deemed appropriate. If the Regional Administrator determines that action at the Central Office level is indicated, he shall refer the matter to the Assistant Secretary for Housing Management.

5. RESPONSIBILITY WHERE AREA OFFICES DO NOT EXIST. Where Area Offices have not been established, the actions specified in paragraph 2 shall be the responsibility of the Director, Tenant Operations and Services Division, of the Regional Office or the ARA for Housing Management and Community Services for Denver. Also, where Area Offices have not been established, the actions specified in paragraph 4 for the Area Director shall be the responsibility of the Regional Administrator.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

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| HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al., Plaintiffs, vs UNITED STATES HOUSING AUTHORITY, ETC., et al., Defendants, NATIONAL TENANTS ORGANIZATION, INC., et al., Intervenors. | CIVIL NO. 71-0-287 ORDER |

This matter comes before the Court on motion of the plaintiffs for summary judgment [Filing #30], on motion of the defendants to dismiss, or, in the alternative, cross-motion for summary judgment [Filing #36], and on motion of the intervenors for cross-motion for summary judgment and for a preliminary injunction [Filing #35]. There have also been filed three requests for exclusion from the class represented by plaintiffs [Filings #29, #32, #33].

Pursuant to the Memorandum issued this date, the Court finds that all of these motions should be overruled, except for plaintiffs' motion for summary judgment. Plaintiff's motion for summary judgment is granted. HUD Circulars RHM 7465.8 and 7465.9 are declared invalid and defendants are enjoined from enforcing same.

IT IS SO ORDERED.

Dated this 10th day of February, 1972.

BY THE COURT

ROBERT V. DENNEY
United States District Judge

# UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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Nos. 72-1102 and 72-1185

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Housing Authority of the City of Omaha, Nebraska, et al., Appellees,

v.

United States Housing Authority, etc., et al., and

National Tenants Organization, et al., Appellants.

Appeal from the United States District Court for the District of Nebraska.

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Submitted: May 11, 1972.

Filed: September 28, 1972.

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Before VOGEL, LAY and BRIGHT, Circuit Judges.

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LAY, Circuit Judge.

At issue is the authority of the Department of Housing and Urban Development to promulgate Regulations RHM 7456.8 and RHM 7465.9 (hereinafter referred to as Circulars 8 and 9), under the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1401-1436. The district court enjoined the implementation of the regulations holding that (1) they were issued in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b), requiring publication of general notice of the proposed rules in the Federal Register and (2) they were invalid under 42 U.S.C. § 1401, the so-called "local autonomy amendment"

of the Housing Act. 54 F.R.D. 402 (D. Neb. 1972). We find this holding to be error and vacate the district court's order.

On February 22, 1971, HUD issued Circulars RHM 7465.8 and RHM 7465.9 (Circulars 8 and 9) pursuant to its apparent authority under the United States Housing Act, 42 U.S.C. § 1401 et seq.[1] Circular 8 basically requires

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1. The background leading up to the issuance of the circulars may be briefly stated. During 1969 a member of various organizations interested in the affairs of public housing tenants, and particularly the National Tenants Organization (NTO), set about to urge the Department of Housing and Urban Development (HUD) to issue a "Tenant Bill of Rights." This endeavor culminated in HUD convening a Conference on Tenants Rights and Responsibilities held in Washington, D. C., in December 1969. Out of that conference grew an *ad hoc* committee chaired by HUD, which included NTO and the National Association of Housing and Development Officials (NAHRO), the purpose of which was to develop a model lease and grievance procedure for low rent public housing. The alleged importance of NAHRO as a member of this drafting committee was that it represented, at least as a national spokesman, between one-third and one-half of all the local housing authorities in the country. Neither NAHRO nor NTO were legal agents for their respective memberships and could not mandatorily bind them as to their mutual discussions.

Thereafter NAHRO, NTO and HUD conducted a series of meetings with the goal of eventually drafting a model lease agreement and grievance procedure. After each meeting new drafts were prepared by HUD based on the recommendations of the task force and were sent to NTO and NAHRO for comment. However, at no time prior to the issuance of the regulations by HUD did NAHRO circulate to its membership the texts of these drafts. NAHRO did set forth a history of the negotiations in its information service bulletin which was sent to all its members on December 21, 1970. A tentative agreement between the two organizations, NAHRO and NTO, was reached on November 5, 1970. Further proceedings were held to alleviate certain concerns expressed by a NAHRO committee.

that the leases used by the housing authorities in renting to the tenants recognize certain "minimum" rights and obligations of the parties. Circular 9 in essence erects the procedural and substantive safeguards attendant to the settling of tenant grievances which are recognized in Circular 8. It is uncontroverted that HUD did not publish general notice in the Federal Register of its intent to develop the rules which were contained in these issued circulars.

Ten local housing authorities across the country, later joined by fourteen others,[2] brought a class suit in the District of Nebraska against HUD alleging that the circulars were issued in violation of the Administrative Procedure Act, 5 U.S.C. § 553, and that they exceeded the limits of rule-making power authorized to HUD by Congress.

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2. The named plaintiffs are: Housing Authority of the City of Omaha, Nebraska; Mobile Housing Board, Mobile, Alabama; Imperial Valley Coordinated Housing Authorities, Brawley, California; Housing Authority of the County of Contra Costa, California; Housing Authority of the City of New Haven, Connecticut; Rock Island County Housing Authority, Illinois; Paintsville Municipal Housing Commission of Paintsville, Kentucky; Housing Authority of the City of Monroe, Louisiana; Cambridge Housing Authority, Cambridge, Massachusetts; Quincy Housing Authority, Quincy, Massachusetts; Housing Commission of the City of River Rouge, Michigan; Housing Authority of the City of Biloxi, Mississippi; Housing Authority of the City of Reno, Nevada; Housing Authority of the City of Elizabeth, New Jersey; Ironton Metropolitan Housing Authority of Ironton, Ohio; Housing Authority of the Choctaw Nation of Oklahoma; Housing Authority of Hugo, Oklahoma; Housing Authority of County of Clackamas, Oregon; Housing Authority of Douglas County, Oregon; Oglala Sioux Housing Authority, Pine Ridge, South Dakota; Bristol, Tennessee Housing Authority; Jackson Housing Authority, Jackson, Tennessee; Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee.

HUD answered and counterclaimed seeking declaratory relief that the regulations were valid. Thereafter the NTO, local tenant organizations and tenants of housing projects operated by plaintiffs were permitted to intervene pursuant to Rule 24(b)(2) Fed. R. Civ. P. The respective parties each sought a summary judgment and a motion for preliminary injunction. The district court ruled in plaintiffs' favor granting the motion for summary judgment declaring the challenged regulations invalid and enjoining their enforcement. HUD and the intervenors filed this appeal.

Under § 10(a) of the United States Housing Act of 1937, 50 Stat. 891, as amended, 42 U.S.C. § 1410(a) (1970), HUD is authorized to enter into an Annual Contributions Contract (ACC) with local housing authorities. Under this contract HUD furnishes a certain amount of money to the local authorities over a period of years. Section 8 of the Housing Act of 1937, 42 U.S.C. § 1408, provides HUD with its general rule-making power which gives HUD the authority to "make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter." Under this rule-making power HUD has issued a Low-Rent Management Manual. The manual "contains requirements that supplement the provisions of the annual contributions contract applicable to project management." *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 275 (1969).

In essence, Circular 8 requires that the local housing authorities incorporate in their leases that rental payments must be accepted without regard to any other monies owed by the tenant; that eligibility requirements and standards for increasing or decreasing rent must be outlined; that reciprocal duties of both the tenant and landlord must be set forth with respect to using reason-

able care in maintaining the premises; that rent shall abate if hazardous defects are not repaired or other accommodations provided within 72 hours following notice to the landlord; that the landlord may inspect the premises only during reasonable hours upon written notice and the tenant may be present at any such inspection; that notices under the lease must be in writing and either delivered personally or by certified mail; that termination of the lease may be only for good cause; and that the tenant must be given the reasons for the eviction at a private conference and permitted the opportunity to reply at a subsequent hearing.

Circular 9 basically requires that a tenant be afforded an administrative hearing before an impartial board or official whenever the lease or the local housing authorities' regulations, policies or practices are alleged to be violated; the tenant must be given notice of the rules governing the hearing and is entitled to have counsel present and to present witnesses and to cross-examine; all decisions are to be in writing with a decision adverse to the local housing authority binding (unless arbitrary or capricious) but a decision adverse to the tenant may be judicially appealed by either party.

The declaration of Section 1 of the United States Housing Act of 1937, 50 Stat. 888, 42 U.S.C. § 1401, declares it to be "the policy of the United States to promote the general welfare . . . and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income."

Section 2 of the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1441, specifies that all agencies "having powers, functions or duties with respect to housing . . . exercise their powers, functions, and duties under this or any other

law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established. . . ."

When the circulars are considered in light of the statutory language, we find it self-evident that their requirements have a "reasonable relationship to the purposes for which HUD's rule-making power was authorized." *Thorpe* v. *Housing Authority of the City of Durham*, supra at 281.[3]

However, the district court held Circulars 8 and 9 invalid on the basis that they violated Section 1 of the Act, which reads in part:

> "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies." Section 1 of the United States Housing Act of 1937, 50 Stat. 888, as amended by § 501 of the Housing Act of 1959, 73 Stat. 679, 42 U.S.C. § 1401.

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3. In issuing the model lease and grievance procedures HUD's Assistant Secretary Norman V. Watson observed:

> "Hopefully, however, these procedures will eliminate much of the landlord-tenant hostility and antagonism that characterized many local programs in recent years. This should reduce total operating costs in the future. Moreover, the elimination of conflict will improve the quality of the living environment and for this purpose the Congress has authorized HUD to make operating subsidies available to Local Housing Authorities. The combination of subsidy and better management-tenant relationships should improve . . . Local Housing Authorities' financial position." Letter of Norman V. Watson, Feb. 8, 1971, to Eneas J. Kane, President of the National Association of Housing and Redevelopment Officials.

The trial court generally concluded that the circulars contravened congressional policy by placing HUD in the position of dictating day-to-day management procedure. We acknowledge that HUD's promulgation of these rules cannot be interpretive support as to the extension of its own power. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946); *Stark* v. *Wickard*, 321 U.S. 288, 309-310 (1944); *United States* v. *New England Coal and Coke Company*, 318 F.2d 138, 143 (1 Cir. 1963); *Stark* v. *Brannan*, 82 F.Supp. 614, 618 (D.D.C. 1949), aff'd 185 F.2d 871 (D.C. Cir. 1950), aff'd 342 U.S. 451 (1952). On the other hand, HUD's prior exercise of its rule-making power does give persuasive force as to defining its responsibility in carrying out the objectives of the Act.[4] Such a departmental construction of its own enabling legislation is to be given great weight when it enhances the general purposes and policies underlying the Act. See *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *Murphy Oil Corp.* v. *Hickel*, 439 F.2d 417, 422 (8 Cir. 1971).

We have no difficulty joining other decisions[5] in approving Circular 9 as it sets forth the mandatory policy

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4. Pursuant to its rule-making policy HUD's low-rent housing manual already requires that programs be developed for involving tenants in the planning process which will consider such needs as changes in management policy and expanded services and facilities (RHA 7485.1a(3)(b)); the lease must warrant that the dwelling complies with local building and housing codes (RHA 7430.1 ch. 3, § 2, ¶ 3e); without HUD approval, only one local housing authority employee may live in a project of over 100 or more dwelling units (RHA 7465.1 ¶ 11a); and certain regulations must be followed with respect to equal employment and discrimination in housing (RHA 7401.1 ch. 9, § 1).

5. Although not passing on this precise question, three courts have given tacit approval to Circular 9. *Glover* v. *Housing Authority of City of Bessemer*, 444 F.2d 158 (5 Cir. 1971); *Housing Authority of City of Milwaukee* v. *Mosby*, 192 N.W.2d 913 (Wis. 1972); *Chicago Housing Authority* v. *Harris*, 275 N.E.2d 353 (Ill. 1971).

requiring certain prescribed grievance procedures. There exists little difference between the notice and hearing requirements approved in *Thorpe* v. *Housing Authority of the City of Durham*, supra, and the requirements included in Circular 9.[6] As the district court stated, Circular 9 does not basically alter the lease; furthermore, it is clear that the details in carrying out these procedures are left entirely in the hands of the local authorities. Moreover, although these grievance procedures may create a greater burden on the local housing authorities, the regulations do not inject HUD into day-by-day operations of the housing authority. First, HUD has nothing to do with the implementation or detailed operation of the procedural process prescribed. Secondly, these grievance procedures may be invoked only when the local authority is alleged to have violated the actual terms of the lease.

Both parties have recited legislative history of the amendment at length. The local housing authority cites remarks of Senators Clark and Proxmire, 105 Cong. Rec. 1868-1869 (1959), which emphasize that the amendment to § 1401 was intended to prevent HUD from interfering with the local authorities. On the other hand the National Tenants Organization emphasizes the view of Dr. Wheaton, representing the National Housing Conference, where he stated:

> "It is the purpose of both H.R. 2357 and H.R. 2385 to make the low-rent program work by restoring to the local housing authorities their appropriate re-

6. The Supreme Court recognized that the local authorities may decide to grant a grievance hearing to an aggrieved tenant. However, the Court went on to note that "if the procedure followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing." *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. at 284 n. 48.

sponsibility for local decisions in the day-to-day operation of their projects. But *in recognizing local responsibility neither of these bills relinquish any of the Federal controls or sanctions which may prove necessary to assure compliance with the terms of the act and to prevent fraud or gross waste and extravagance by the local housing authorities.*" (Emphasis ours.) Hearings on H.R. 2357, 2385 Before the Subcommittee on Housing of the Committee on Banking and Currency, 86th Cong., 1st Sess. 197-198 (Jan. 1959).[7]

HUD urges that the amendment was designed primarily to give greater responsibility to local authorities on auditing and budgeting review. This may well have been the initial motivation. However, the end legislation is much broader, particularly as it must be read with Section 2(6) of the Act which defines administration.[8] See H.R. Rep. No. 566, 86th Cong., 1st Sess. 48-49 (1959). Nevertheless, we think it clear that HUD does have the ultimate supervision and authority in carrying out the objectives of the Housing Act. We conclude this to be true by the express terms of the statute itself as well as by the legislative history set forth above.

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7. The Senate Report gives support to Dr. Wheaton's view: "The legislative change suggested by the Commissioner appears in section 401 of the bill. This change is intended to relieve the Public Housing Administration of much of the detail of policing and supervising local management operations and of placing responsibility for these matters on the local public agencies" S. Rep. No. 41, 86th Cong., 1st Sess. 36 1959).

In taking into account the above legislative history we adhere to the general principle that committee reports represent the most persuasive indicia of congressional intent. See *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969); *United States* v. *O'Brian*, 391 U.S. 367, 385 (1968); *Northern States Power Co.* v. *State of Minnesota*, 447 F.2d 1143, 1152 (8 Cir. 1971), aff'd, 405 U.S. 1035 (1972); see generally, G. Folsom, *Legislative History*, 33 (1972).

8. "The term 'administration' means any or all undertakings necessary for management, operation, maintenance, or financing . . . subsequent to physical completion." 42 U.S.C. § 1402(6).

In interpreting Section 1401, we find it significant that (1) there was not a complete transfer of authority to the local housing authorities,[9] (2) although "administration" is not confined to budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with the National Authority to achieve uniformity in fulfilling the objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy. When the latter occurs the real limitation to HUD's authority to act is whether its policies are reasonably related to carrying out Congress' expressed objectives to the low-rent housing program.

The background history leading up to the promulgation of the circulars clearly reflects a national concern as to the inequities in public housing throughout the nation.[10]

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9. "Your committee considered carefully the question of whether to bestow more local autonomy by an express statutory transfer of authority. We concluded that such action was unnecessary in view of assurances by the Public Housing Administration that the desired objectives could be accomplished by changes in administrative procedures and practices." H. R. Rep. No. 86, 86th Cong., 1st Sess. 30 (1959).

10. See Schoshinski, *Public Landlords and Tenants: A Survey of Developing Law*, 1969 Duke L. J. 399; *Public Housing*, 22 Vand. L. Rev. 875 (1969).

HUD believed the grievance procedure established in Circular 9 was needed to help alleviate the friction and strain in tenant-management relations which would thereby "promote improved housing environment to the advantage of the low-rent public housing program. . . ." (RHM 7465.9) The underlying facts of, for example, the strains between management and tenants which HUD claims have partly justified the development of these circulars must be presumed to exist. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69 (1937). Furthermore, whether or not HUD

is correct in believing that the circulars will improve tenant-management relations and the public housing environment is not for a court to predict. Our function is not to act as a super-commission. *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 308-309 (1953). As the Supreme Court noted in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 227-228 (1943):

> "[W]e have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. [cases omitted] These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged."

Cf. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). In *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280 (1969), the Court dispelled any doubts that the HUD regulation at issue was authorized by the statute by saying:

> "One of the specific purposes of the federal housing acts is to provide 'a decent home and a suitable living environment for every American family' that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal. We therefore cannot hold that the circular's requirements bear no reasonable relationship to the purposes for which HUD's rule-making power was authorized."

Here HUD seeks to institute new lease provisions which primarily recognize the rights of tenants while at the same time not ignoring the rights of landlords, and which institute new grievance procedures designed to reduce friction and courtroom litigation. These objectives, in turn, are alleged to promote the larger goals of better tenant-management relations and better public housing environments which doubtless conform with the objectives of the Housing Act. It is not unreasonable or arbitrary to expect that the new lease provisions and grievance procedures may bring about these desired goals. See *Housing Authority of City of Milwaukee* v. *Mosby*, 192 N.W.2d 913 (Wis. 1972).

Although the congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUDS's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. In fact, the legislative history reads to the contrary.[11] HUD has a responsibility to police performance of its contracts so that decent, safe and sanitary character of public dwellings is maintained in accordance with the purposes of the Housing Act. See *Knox Hill Tenant Council* v. *Washington*, 448 F.2d 1045, 1048 (D.C. Cir. 1971).[12] Although a policy declaration as contained in Section 1401 is entitled to judicial respect upon construction of the statute, it cannot restrict an agency's responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408. Cf. *Duke Power Company* v. *FPC*, 401 F.2d 930, 938 (D.C. Cir. 1968).

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11. Even the remarks of Senator Clark lend recognition to HUD's ability to set overall policy. For although HUD is to keep a "hands off" position, this is effective only "unless and until you [HUD] have reason to believe that they [local housing authorities] are not performing their public duties." 105 Cong. Rec. 1869 (1959).

12. HUD additionally argues that the circulars are authorized since many of them are constitutionally mandated. This argument begs the question. Cf. Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 Yale L.J. 463, 492 (1971). Whether the circular provisions are constitutionally sanctioned is not relevant to the question of whether they are authorized under § 1401. Cf. *Arizona State Department of Public Welfare* v. *Department of HEW*, 449 F.2d 456, 468 (9 Cir. 1971), cert. denied, 405 U.S. 919 (1972); *Almenares* v. *Wyman*, 334 F.Supp. 512, 521 (S.D.N.Y. 1971), aff'd 453 F.2d 1075 (2 Cir. 1971), cert. denied, 405 U.S. 944 (1972).

*NOTICE*

Finding that the circulars are within HUD's statutory rule-making authority, we must still determine whether the circulars are unlawful by reason of HUD's failure to comply with the notice provision of Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553.[13]

Title 5 U.S.C. § 553(b) requires notice of proposed rulemaking to be published in the Federal Register by the agency in question. Section 553(a) provides in relevant part that:

> "This section applies, according to the provisions thereof, except to the extent that there is involved— . . .
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

The exemptions of matters under Section 553(a)(2) relating to "public benefits," could conceivably include virtually every activity of government. However, since an expansive reading of the exemption clause could easily carve the heart out of the notice provisions of Section 553, it is fairly obvious that Congress did not intend for the exemptions to be interpreted that broadly. The legislative history tends to support this logic. The Senate Judiciary Committee reported on its version (S. 7) of the Administrative Pro-

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13. The district court found that there exists an issue of fact as to whether certain plaintiffs may have had actual notice of the proposed rules thereby possibly avoiding the specific requirements of publication under the Act. *N.L.R.B.* v. *Chelsea Clock Co.*, 411 F.2d 189 (1 Cir. 1969); *Kessler* v. *F.C.C.*, 326 F.2d 673, 690 (D.C. Cir. 1963); *United States* v. *Aarons*, 310 F.2d 341 (2 Cir. 1962); *Owensboro On the Air* v. *United States*, 262 F.2d 702, 708 (D.C. Cir. 1958). *Contra, Hotch* v. *United States*, 212 F.2d 280, 283 (9 Cir. 1954). However, in view of its conclusion that HUD had no power under Section 1401, the district court found it unnecessary to pass on the factual notice issue.

cedure Act as follows: "It should be noted . . . that the exceptions apply only 'to the extent' that the excepted subjects are *directly* involved." (Emphasis ours.) S.Rep. 752, 79th Cong., 1st Sess. 13 (1945). Not only were exempted regulations limited to those where the excepted subjects were directly involved, but also the excepted subjects appeared to be limited in their scope to those where the government had a "proprietary" or other unique interest. The specific exemption for "public contracts" seems to have developed from a concern to avoid having the notice section applied to minimum wage determinations of the Department of Labor in connection with public contracts. S.Doc. 248, 79th Cong., 2d Sess. 17-18 (1946). In 1946 the Department of Labor was authorized to issue public contracts under the Davis-Bacon Act (40 U.S.C. § 276 et seq.) and the Walsh-Healey Act (41 U.S.C. §§ 35-45). In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129 (1940), the Court held that the government must be free from vexatious restraints which interfere with the manner in which it may dispatch it own internal affairs. To insure that the notice provisions of the APA would not be used in a similar manner to restrain the government's administration of public contracts, Congress included the exemption. See D. Reich, *Administrative Procedure Act: Analysis of its Requirement as to Rule-Making,* 33 A.B.A.J. 315, 317 (1947).

The Annual Contributions Contract represents a governmental "proprietary interest," in that it effectuates the government's stewardship over public housing projects which are purchased with public funds. The Housing Act makes this clear. If any local housing authority fails to adhere to its obligations under the contract, HUD can reduce or terminate the annual contributions payable under such contract [14] or even assume management of the project.[15]

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14. 42 U.S.C. § 1415(3).
15. 42 U.S.C. § 1413(a).

In a somewhat analogous situation, the Federal Housing Administration (FHA) has offered mortgages at very reduced interest rates to industry to encourage the building of low-rent housing. In exchange for the mortgages, the FHA implemented a number of extensive regulations covering the activities of the mortgagor. Among these were regulations controlling and supervising rents. One regulated project, Chenango Court, Inc., applied to FHA for an increase in the rents which was approved accordingly but without any prior notice. In a challenge to the action in *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2 Cir. 1971), the court ruled that the notice provisions of the APA did not apply because of the exception in Section 553(a). See also *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1247 n. 4 (1 Cir. 1970) (FHA mortgage regulation exempted); *Stroud* v. *Bensen*, 155 F.Supp. 482, 490 (E.D. N.C. 1957) (regulation to protect agricultural loan exempted).[16]

As earlier observed in *Thorpe*, HUD's circulars in question directly supplement the Annual Contributions Contract by imposing additional obligations on the parties. 393 U.S. at 275. We hold that the district court erred in not holding as a matter of law that the exemption under 5 U.S.C. § 553(a)(2) was applicable. See *Chicago Housing Authority* v. *Harris*, 275 N.E.2d 353 (Ill. 1971).

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16. The exemptions have not been limited to cases where the government has a proprietary interest. Courts have relied on the statutory language which also excludes regulatory matters involving grants and benefits. Thus, in *Lazar* v. *Benson*, 156 F.Supp. 259, 270 (E.D.S.C. 1957), the court held that as a matter of law agricultural regulations relating to an agricultural price support program were exempt from the notice of proposed rule-making requirements because the matter related to "loans, grants, benefits, or contracts." Likewise, the court in *Rodriquez* v. *Swank*, 318 *F.Supp.* 289 (N.D. Ill. 1970), held that the requirement of notice was inapplicable because matters relating to welfare grants are exempted.

This brings us to the final argument raised on appeal—that the coerced implementation of the circulars by withholding funds violates the due process clause of the Fifth Amendment. On May 7, 1971, HUD promulgated Circular HM 7465.1 Supp. 2 which provided in paragraph 4 that HUD could withhold funds *other than guaranteed subsidies* in the Annual Contributions Contract against those local housing authorities which failed to implement HUD's model lease and grievance procedures. In the *Thorpe* case the Supreme Court strongly suggested that such an action might violate the constitutional prohibition of impairment of contracts. U.S. Const. Art. 1 & 10; *Lynch* v. *United States,* 292 U.S. 571, 579 (1934); see *Thorpe* v. *Housing Authority of the City of Durham, supra* at 279 n. 33. On the record before us HUD has never approved the withholding of any funding pursuant to HM 7465.1 Supp. 2. In fact, the circular itself specifies that withholding of funds is only one possible means of enforcement, with alternative remedies including judicial relief "or such other action as may be authorized and deemed appropriate." HM 7465.1 Supp. 2, ¶ 4 (May 7, 1971). Since there exists no threatened loss of funds for failure to comply with Circulars 8 and 9, the issue of contract impairment at this time is purely hypothetical. In *Thorpe,* the Court observed, "We do not sit, however, 'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.'" 393 U.S. at 284. Under the circumstances we determine that HUD was within its authorized power to promulgate Circulars 8 and 9 and that any decision as to the constitutionality of using HM 7465.1 Supp. 2 to assure implementation of the circulars would be premature.[17]

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17. The trial court did not pass on the local authorities' remaining objection that HUD's promulgation of the circulars unlawfully alter the ACC contract. We find little merit to this argument. See *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. at 280 n. 35.

Judgment reversed and remanded with directions to enter summary judgment on behalf of the United States Housing Authority upholding the validity of the circulars.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
St. Louis, Mo. 63101
October 11, 1972

Robert C. Tucker, Clerk
Mr. Alvin Hirshen
Mr. R. Ladd Lonnquist
Prof. Frank Goodman
Mr. A. J. Cooper, Jr.
Mr. Thomas J. Long
Messrs. Thomas G. Wilson
Alan S. Rosenthal, Attorneys
Hon. William K. Schaphorst
Mr. Patrick W. O'Brien
Mr. William E. Doyle
Mayer, Brown & Platt
Kennedy, Holland, DeLacy & Svodboda
Susman, Stern, Agatstein & Heifetz

Re: No. 72-1102 & 72-1185. Housing Authority of the City of Omaha, et al v. U. S. Housing Authority, etc., et al.

Dear Sirs:

Kindly substitute the following paragraph for the last paragraph in the copy of the opinion in the above case sent to you on September 28, 1972:

"Judgments reversed and remanded with directions to enter summary judgments on behalf of the defendants and intervenor parties upholding the validity of the circulars."

Very truly yours,

ROBERT C. TUCKER
Clerk

eh

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 72-1102 and 72-1185

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al,

Appellees,

v.

UNITED STATES HOUSING AUTHORITY, etc., et al,

and

NATIONAL TENANTS ORGANIZATION, INC., et al,

Appellants.

---

Appeal from the United States District Court for the District of Nebraska

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# Appellees' PETITION FOR REHEARING AND SUGGESTION OF IN BANC REHEARING

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# INDEX

PAGE

INTRODUCTION ..... A-42

1. The Opinion Does Not Face Up to—Misapprehends—The Fact That Circular 9 Grievance Procedure Decisions Bind Local Housing Authorities But Do Not Bind Tenants ..... A-42

2. The Opinion Misapprehends And Overlooks The Fact That Circular 9 Grievance Procedures Are Applicable To Any Tenant Grievance Claimed To Affect "Rights, Duties, Welfare Or Status" .... A-43

3. The Opinion Overlooks The Fact That Both Circulars 8 and 9 Must Be Incorporated Into Every Lease And That They Basically Alter Every Lease ..... A-44

4. The Opinion Misapprehends The Public Policy Of the United States: To Vest in LHA's The "Maximum Amount Of Responsibility For Any And All Undertakings Necessary For The Management, Operation And Maintenance Of Low Rent Housing Units" ..... A-46

5. The Opinion Misapprehends Thorpe v. Housing Authority, 393 U.S. 268 (1969), Which Teaches That HUD Circulars Are Invalid If They Violate The Local Autonomy Amendment Or Impair LHA Contracts ..... A-49

6. The Opinion Misapprehends The Principles Which Govern The "Public Contracts" Exemptions From The Notice Provisions Of The Administrative Procedure Act ..... A-52

CONCLUSION ..... A-55

## INTRODUCTION

This is a case of exceptional importance. Before this Court as named plaintiffs are twenty four local housing authorities (LHA's) from 18 states representing a class consisting of all the LHA's in the United States, about 2900 (A 27). The defendants are the Secretary of Housing and Urban Development, George Romney (HUD), and the National Tenants Organizations, Inc. (NTO), which claims to represent all public housing tenants and their organizations. The issues are whether HUD mandated lease and grievance procedures, Circulars 8 and 9: (1) violate "the congressional policy of allowing local authorities to retain maximum control over the administration" of their projects (*Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969)), (2) unlawfully impair the leases between LHA's and tenants and the annual contribution contracts between LHA's and HUD, and (3) whether HUD, in promulgating the Circulars, was exempt from the rule making provisions of the Administrative Procedure Act by reason of the public contracts exception. The case was submitted on May 11, 1972 and decided on September 28, 1972.

Plaintiffs submit this petition for rehearing in banc because this Court's opinion reversion the district court's rulings that HUD had exceeded its power and was not exempt from the rule making provisions of the APA is based upon grave misapprehensions about (1) the sweep of Circulars 8 and 9, (2) the applicable sections of the Housing Act of 1937, as amended, and (3) the opinions of the United States Supreme Court which support the district court. 1. *The Opinion Does Not Face Up To—Misapprehends—The Fact That Circular 9 Grievance Procedure Decisions Bind Local Housing Authorities But Do Not Bind Tenants.* In this important case where HUD's power to regulate is challenged, precision in analyzing the regulation involved is

imperative and that is what is missing from the Opinion. Thus it is recognized (Op. p. 5), "a decision adverse to the [LHA] is binding (unless arbitrary or capricious)". It is then stated that "a decision adverse to the tenant may be judicially appealed by either party". But the fact of the matter is that when a tenant loses, the Circular does not give him a right of judicial appeal—he is granted much more, the right to *ignore* an adverse decision! As the Circular states:

> "A decision by the Hearing Panel, which is in favor of the LHA or project management and/or denies the complainant his requested relief in whole or in part, shall not constitute a waiver of, nor affect in any manner, whatever rights the complainant may have to a trial de novo in judicial proceedings which may thereafter be brought in the matter. In such judicial proceedings, the LHA shall, by stipulation or other appropriate means, be limited to invoking against the complainant the grounds originally relied on by the LHA in its proposed disposition of the complaint or grievance" (A 110).•

If the Hearing Panel renders a decision adverse to the tenant, *e.g.*, in an eviction case or in an effort to collect $10 for a deliberate window breaking, the tenant loses nothing and the LHA has "won" only the right to start over in a state trial court. But a decision adverse to the LHA on *any* matter deemed to involve a tenant's rights, welfare or status, is binding on the LHA. 2. *The Opinion Misapprehends And Overlooks The Fact That Circular 9 Grievance Procedures Are Applicable To Any Tenant Grievance Claimed To Affect "Rights, Duties, Welfare Or Status."* It is stated in the Opinion (p. 8) that "these grievance procedures may be invoked *only* when [a LHA] is alleged to have

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• "A110" means page 110 of Appellant's Appendix.

violated the actual terms of the lease" (emphasis added).* But Circular 9 is not limited to alleged lease violations. Circular 9 says the grievance procedure applies to:

> "* * * any dispute with respect to LHA action or failure to act in accordance with lease requirements, *or any LHA action or failure to act involving interpretation, or application of the LHA's regulations, policies or procedures which affects the rights, duties, welfare or status of the complainant* (A 106, emphasis added)."

What HUD has ordered, and what the Opinion overlooks, is that the grievance procedures of Circular 9 are triggered by any possible complaint a tenant or group of tenants might have about anything at all. Thus, a basic premise of the Opinion—that Circular 9 "grievance procedures may be invoked only when the local authority is alleged to have violated the actual terms of the lease" (p. 8)—is without foundation.

3. *The Opinion Overlooks The Fact That Both Circulars 8 and 9 Must Be Incorporated Into Every Lease And That They Basically Alter Every Lease.* At page 4 is stated what is said to be the "essence" of Circular 8, the Circular which tells what leases must contain. Overlooked—ignored—is the crucial fact that Circular 8 orders that every LHA lease must incorporate the Circular 9 grievance procedures. Circular 8 says every lease: "*shall* include provisions covering (A 92): * * * (13) The agreement that *any tenant grievance or appeal from management's decision* shall be resolved in accordance with LHA procedures consistent

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* Earlier (Op. p. 5) it is somewhat more accurately, but inconsistently, stated that "Circular 9 basically required that a tenant be afforded an administrative hearing before an impartial board or official whenever the lease or the [LHA's] regulations, policies or practices are alleged to be violated." Even that overlooks the actual text of Circular 9.

with HUD regulations covering such procedures" and orders that the grievance procedures be expressly "incorporated" into every lease (A 94, 101 emphasis added). And, in promulgating Circular 9, HUD said "all low-rent public housing leases" must incorporate HUD's grievance procedures (A 103).

The Opinion overlooks the most drastic provision of Circular 8, that Circular 9 grievance procedures are part of every lease, when it is said (p. 7): "As the district court stated, Circular 9 does not basically alter the lease." This misapprehends not only the unmistakable alteration of every lease by Circular 9, but what the district court stated:

> "Circular 8 [provides] • • • that dwelling leases must include: • • • that tenant grievances shall be resolved in accordance with LHA procedures consistent with HUD regulations covering such procedures.
>
> "Circular 9 • • • provides for LHA's to adopt grievance procedures, including a hearing for all tenant grievances and that the decision of the official or panel that conducts the hearing shall be binding upon the LHA but not upon the tenant.
>
> • • •
>
> "It is apparent from the evidence that the provisions of Circular 8 are not contained in the basic lease agreement of the plaintiff LHA's• • • •.
>
> "The evidence also indicates that the LHA's do not presently employ the grievance procedures of Circular 9• • • •" (A 198).

Since the provisions of Circular 9 must be incorporated into every lease, it *alters* every lease. Since Circular 9 does change fundamental landlord-tenant relationships, it *basically* alters every lease. Thus another basic prop of the Opinion—that the grievance procedures of Circular 9 do not basically alter LHA leases and that the district court so held—falls.

4. *The Opinion Misapprehends The Public Policy Of The United States: To Vest In LHA's The "Maximum Amount Of Responsibility For Any And All Undertakings Necessary For The Management, Operation And Maintenance Of Low Rent Housing Units".** The Housing Act of 1937 was amended to include this language in 1959. It is known as the "Local Autonomy Amendment" (A 196). The Supreme Court describes it as expressing "the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 278 (1969). Various reasons are advanced in the Opinion to support the conclusion that the Circulars do not conflict with the Local Autonomy Amendment. Thus, it is said that Circular 9 does not basically alter the lease and that the grievance procedures may be invoked only when the LHA is alleged to have violated the actual terms of the lease (Op. pp. 7, 8). The lack of merit in these reasons has been demonstrated in sections 1, 2 and 3 above.

Set forth below are the other reasons advanced in the Opinion for finding the Local Autonomy Amendment inapplicable and why each such reason is without merit or support in the record or both.**

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* The language in the heading is from § 1 of the Act (Op. p. 6) substituting for the word "administration" in § 1 its definition (Op. fn. 8, p. 9).

** We should point out that plaintiffs have no quarrel with the propositions in the Opinion that "HUD does not have the ultimate supervision and authority in carrying out the objectives of the Housing Act", that the Local Autonomy Amendment "was not a complete transfer of authority" to the LHA's that "ultimate responsibility for policy" lies with HUD to achieve uniformity in fulfilling the objectives of the Act", that "ultimate authority is vested in HUD to set overall policy", that "HUD has a responsibility to policy performance of its contracts so that decent, safe and sanitary character of public dealings is maintained in accor-

It is stated in the Opinion (p. 11) that the Local Autonomy Amendment "is entitled to judicial respect upon construction of the statute [but] it cannot restrict [HUD's] responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408." However, § 1408 is merely a standard grant of power to make rules to "carry out the provisions" of the Act. Surely HUD's exercise of its rule making power must be such as to carry out *all* provisions of the Act, including the "purposes and objectives of the Act as expressly evidenced" by the Local Autonomy Amendment. As this Court has held: "'A regulation which • • • operates to create a rule out of harmony with the statute, is a mere nullity • • •'". *Northern National Gas Co.* v. *O'Malley*, 277 F.2d 128, 134 (1960). Thus, it is clear that the Opinion has misapprehended the fact that the Local Autonomy Amendment does restrict HUD's rule making authority and is binding upon HUD and the courts. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277-8 (1969).

It is stated in the opinion that the Local Autonomy Amendment does not apply because (a) "the details in carrying out [the grievance] procedures are left entirely in the hands" of LHA's, (b) that the grievance procedures "do not inject HUD into day-by-day operations" of LHA's, and (c) that "HUD has nothing to do with the implementation or detailed operation" of the prescribed grievance procedures (Op. pp. 7, 8). All true; all beside the point. The point is that Circulars 8 and 9 are nullities because "out of harmony with the statute." They are such because the

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dance with the purposes of the Housing Act", and that HUD has been granted the power to make rules to "further the purposes and objectives of the Act" (Op. pp. 9-11). The point simply is that Circulars 8 and 9 violate one of the objectives and purposes of the Act: that LHA's have the maximum amount of responsibility for management and operation of their projects.

Local Autonomy Amendment puts the "maximum amount of responsibility" for operations in the hands of LHA's, and Circulars 8 and 9 take it away. HUD by its imposition of formal grievance procedures on all LHA's for any complaint about anything has clearly interposed a barrier to the exercise by LHA's of the responsibilities placed in their hands by Congress. It is not that the Circulars inject HUD, as such, into details, day-to-day operations, etc., but rather that HUD has stripped local authorities of their congressionally mandated maximum control over their projects, substituting for it HUD's one-way grievance procedures in connection with every detail of the operations of every LHA regardless of its size, relationships with its tenants, its existing grievance procedures or the state of negotiations with tenants to establish grievance procedures tailored to the variety of circumstances in thousands of different sized projects.*

HUD has, in short, attempted to transfer to "Hearing Panels" powers which Congress has withheld from HUD. Thus the Circulars not only violate the Local Autonomy Amendment but, as was urged below (A6) and held in a similar situation, they constitute "delegation running riot" "clearly violative of the due process clause of the fourteenth amendment." *Housing Authority of Woonsocket* v. *Fetzik*, 289 A.2d 658, 662-3 (Sup. Ct., R.I., 1972).

It is stated (Op. pp. 9, 10) that Circulars 8 and 9 resulted from HUD's determining the LHA's (a) "have failed to act or have acted in an inimical way to the objectives of the Act" and (b) "have failed to measure up to the objectives of the Act". On the contrary, Circulars 8 and 9, as is clear from the HUD statements upon their release, were *not*

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* Although 400,000 of nearly 1,000,000 units in management are in 28 large LHA's with programs varying from 5,000 to 157,000 units, most public housing programs are quite small and in small communities. Genung, *Public Housing—Success or Failure*, 39 Geo. Wash. L. Rev. 734, 735-6 (1971).

based upon determinations or findings adverse to the activities of LHA's, or any of them. What HUD said in issuing both was that the Circulars would "improve management-tenant relationships and promote improved housing environment" (A91, 103). But HUD has not been left free by Congress to issue whatever rules it might deem appropriate to "improve management-tenant relationships or promote an improved housing environment" because of strains or friction. The law is that HUD's rules must be judged against all of the provisions of the Act, including the Local Autonomy Amendment. When that is done, it is clear that the district court correctly ruled that HUD stepped out of bounds in ordering the Circular 9 grievance procedures incorporated into every LHA lease.

Quite apart from the specific restrictions imposed by the Local Autonomy Amendment, that Congress did not grant HUD the power sought to be exercised by the Circulars is evident from its detailed legislation on all phases of public housing. Thus, in a 1969 amendment Congress directed that the annual contributions contract of every LHA must contain a requirement that an applicant deemed ineligible for admission be given "an opportunity for an informal hearing" on the matter. 42 U.S.C. § 1410(g)(4)(i). HUD's rules, if sustained, direct that a tenant shall be granted a formal hearing on any grievance whatsoever, the result of which is never binding on the tenant.

5. *The Opinion Misapprehends Thorpe* v. *Housing Authority, 393 U.S. 268 (1969), Which Teaches That HUD Circulars Are Invalid If They Violate The Local Autonomy Amendment Or Impair LHA Contracts.* The basic misapprehensions in the Opinion about the Circulars and the opinion in *Thorpe* combine in the statement (Op. p. 7) that: "There exists little difference between the notice and hearing requirements approved in Thorpe • • • and the requirements included in Circular 9". The fact that Circular 9

substantially alters lease provisions and mandates one sided grievance procedures for any type of grievance has been discussed above.

*Thorpe* grew out of an eviction effort by one LHA against one tenant. The Circular involved was entirely different from those before this Court. The Circular before the Supreme Court had "minimal effect upon the Authority's 'responsibility [for] administration'", did not "purport to change the terms of the lease" and, in fact, left the lease "inviolate":

> "The Circular imposes only one requirement: that the Authority comply with a very simple notification procedure before evicting its tenants. Given the admittedly insubstantial effect this requirement has upon the basic lease agreement under which the Authority discharges its management responsibilities, the contention that the Circular violates the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects is untenable." (393 U.S. at p. 278).

The Court in *Thorpe* did not approve of any particular procedure for hearing eviction matters. It said nothing at all about hearing procedures for general grievances. In rejecting the tenant's contention that the Court should "establish guidelines to insure that she is provided with not only the reasons for her eviction but also a hearing that, comports with requirements of due process", the Supreme Court did, of course, discuss the matter of hearings in eviction cases in a general way (393 U.S. at pp. 283-4). However, such questions are not before this Court. There is no basis, therefore, for the claim that any Circular remotely similar to Circular 9 was even discussed, much less approved in *Thorpe*. What is important about *Thorpe* is the Supreme Court's rationale which was overlooked in the Opinion.

In *Thorpe,* the LHA also argued that the "simple notifi-

cation procedure" required by the Circular at issue was invalid because it impaired the LHA's obligations under its leases and its Annual Contributions Contract (ACC) with HUD. The same issues are before this Court. We have already shown how Circulars 8 and 9 dramatically alter all LHA leases. It is equally clear in this case that the ACC of every LHA is impaired by the Circulars.

It is stated in the Opinion (p. 15): "Since there exists no threatened loss of funds for failure to comply with Circulars 8 and 9, the issue of contract impairment [as to the ACC] at this time is purely hypothetical."

In *Thorpe* it was said that the ACC was not affected, that although in a "sense" the Circular "supplements" the lease, the obligation imposed by the Circular was imposed by "HUD's wholly independent rule making power." The Court then said: "A far different case would be presented if HUD were a party * * * arguing that it could repudiate its obligations under the ACC because the Authority had failed to follow the 'Circular'" (393 U.S. at p. 279).

Here, unlike *Thorpe,* HUD *is* a party and *is* arguing that it could repudiate its obligations for an LHA's failure to follow Circulars 8 and 9. HUD alleged below that LHA's "which refuse to implement these Circulars are failing to perform their obligations under the provisions of the [ACC]" (A13, 14). This allegation is not only a threat of loss of funds, it is a threat to take over the projects of non-complying LHA's. As the Opinion accurately states (pp. 13, 14): "If any [LHA] fails to adhere to its obligations under the [ACC] HUD can reduce or terminate the annual contributions payable under the [ACC] or even assume management of the projects." In November, 1970, HUD sent to all LHA's an opinion of a district court which held that the Act gives HUD "wide discretion to define conditions which shall constitute a 'substantial default' and to

take quick, definitive action once such a default occurs".* And, the Opinion recognizes (p. 15) that HUD in May, 1971, formally announced that "withholding of funds" was one means of enforcing the Circulars by HUD. Furthermore, in December 1971, all LHA's in Kentucky received a written direct threat from HUD that modernization funds will not be allocated to any LHA that has not adopted the Circulars, and where such funds have been allocated, HUD will not approve expenditure until they are adopted (A29, 33, 36). Thus, the threats being clear, there is no basis for the view (Op. p. 15) that the issue of "contract impairment" is "purely hypothetical."

Furthermore, the action below was, among other things, properly brought under the Declaratory Judgment Act, 28 U.S.C. § 2201 (2, 3), and it is undeniable that an "actual controversy" about the rights and obligations of LHA's and HUD under the Circulars and ACC's is before this Court.

*Thorpe* and this case are similar in that each deals with HUD rule making power. When the tests applied by the Supreme Court to the Circular before it are applied to the Circulars 8 and 9, it is clear that they must be set aside.

6. *The Opinion Misapprehends The Principles Which Govern The "Public Contracts" Exemption From The Notice Provisions Of The Administrative Procedure Act.* The Opinion correctly states (p. 13) that the public contracts exception applies only to the "extent that the excepted subjects are *directly* involved" and when the government is acting in its "proprietary" capacity (emphasis in original).

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* Notice 70-20, November 30, 1970, to All Local Housing Authorities which forwarded the unreported decision of the Northern District of West Virginia in U.S. v. Barrett et al. (aff'd 442 F.2d 642 (4th Cir., 1971)) and said it should be brought to the "personal attention" of each of LHA's Counsel.

Thus, if the Circulars do not *directly* involve public contracts, here ACC's, HUD was required to follow the notice provisions for rule making of the Act. It is undisputed that it did not do so (Op. p. 12).

Despite the fact that elsewhere the Opinion states that the issue of impairment of ACC contracts is "purely hypothetical" (p. 15), on the APA issue the Opinion states: "As earlier observed in *Thorpe,* HUD's Circulars in question *directly supplement* the [ACC] by imposing additional obligations on the parties" and hence are within the exemption (emphasis added, Op. 14). What the Supreme Court actually said in *Thorpe* was:

> "The respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged. Each provision of that contract is as enforceable now as it was prior to the issuance of the circular. Although the circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, *that obligation is imposed under HUD's wholly independent rule-making power*" (393 U.S. at p. 279 (emphasis added)).

Thus, the public contracts exception is not applicable because at best, ACC's are only *indirectly* involved, in the "sense" that an additional obligation is sought to be imposed on LHA's under HUD's "wholly independent rule-making power."

But there is a second test to be met—whether HUD, when it issued the Circulars, was acting in its "proprietary" capacity, dealing with the government's "internal affairs" such as fixing the "terms and conditions under which the Government will permit goods to be sold to it" (*Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 129 (1940) (Op. p. 13). Obviously it was not. As was said in *Thorpe,* the obligations in the Circulars are imposed under "HUD's wholly independent rule-making power".

The Opinion (p. 14) suggests that *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) and *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) are analogous. It seems obvious that general notice of rule making need not be published where all that is involved is a rent increase for one project (*e.g.* in Binghamton, New York (*Langevin*) or Boston, Massachusetts (*Hahn*)), and that is all that was involved in those cases.*

Thus, there is no basis in law or fact, for the conclusion stated in the Opinion that the district court erred in holding the public contracts exemption of the Administrative Procedure Act not applicable.

HUD's failure to comply with the mandatory notice provisions for rule making when it exercised its legislative function and issued Circulars 8 and 9 requires that they be set aside. *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969).

In addition, the Opinion overlooks the issue presented below but not decided (A6) that the procedures utilized by HUD (Op. f.n. 7, p. 2) denied procedural due process to plaintiffs because they offend against the "concept of fair hearing" for this class of case "even though no such requirements had been specified by Congress", *American Airlines, Inc.* v. *C.A.B.*, 359 F.2d 624, 632 (D.C. Cir. 1966). The existence of this factual issue also is a bar to the entry of summary judgment for HUD.

In holding that HUD, when it issues rules of general application such as Circulars 8 and 9, is bound by the notice provisions of rule making, the district court properly followed the guidance of the United States Supreme Court

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* The other cases referred to in the Opinion (p. 14) all *directly* related to loans and grants from the government, matters not here involved.

in *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The plurality opinion said that the notice requirements of the Act for rule making were designed to assure "fairness and mature consideration of rules of general application" (394 U.S. at p. 764). Although dissenting, Judge Douglas agreed with that principle:

> "The rule making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard • • • Agencies discover that they are not always a depository of ultimate wisdom; they learn from the suggestions of outsiders, and often benefit from that advice • • • Public airing of the problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us" (394 U.S. at pp. 777-8).

Justice Harlan, although also dissenting, joined with Justice Douglas and the plurality opinion on the importance of the notice requirements in rule making when he stated that it is "precisely in these situations in which 'established patterns of conduct are revolutionized, that rule making procedures perform the vital functions'" described by Justice Douglas (394 U.S. at p. 781).

## CONCLUSION

The Opinion approves a HUD exercise of power by overlooking: (1) the text and effect of the regulations involved; (2) the mandate of Congress that local authorities are to retain maximum control over their projects and the teaching of the Supreme Court in *Thorpe* that HUD may not act inconsistent with this policy or impair LHA leases and contracts; (3) the facts that the Circulars are rules of

general application not pertaining to HUD's proprietary capacity (its internal affairs) and hence the notice provisions for rule making should have been followed and that the procedure which HUD did follow denied plaintiffs due process.

For all of the above reasons, plaintiffs submit that their petition for rehearing and suggestion of an in banc rehearing should be granted and the judgment of the district court affirmed.

Respectfully submitted,

.....

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.....

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# UNITED STATES COURT OF APPEALS

## For the Eighth Circuit

No. 72-1102. September Term, 1972

Housing Authority of the City of Omaha, Nebraska, et al,
Appellees,

vs.

United States Housing Authority et al,
Appellants.

No. 72-1185.

Housing Authority of the City of Omaha, Nebraska, et al,

vs.

United States Housing Authority,
Appellant,

and George Romney, Secretary of the United States Department of Housing and Urban Development, et al.

Appeals from the United States District Court for the District of Nebraska.

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

October 26, 1972

NO. ....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

Petitioners,

v.

UNITED STATES HOUSING AUTHORITY, et al., and

NATIONAL TENANTS ORGANIZATION, et al.,

Respondents.

## CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 1972, three copies of the above Petition for Writ of Certiorari were airmailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to the attorneys who appeared for the government and for the intervenors in the United States Court of Appeals for the Eighth Circuit.

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No. 72-793

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

*Petitioners,*

v.

UNITED STATES HOUSING AUTHORITY, et al., NATIONAL TENANTS ORGANIZATION, et al.,

*Respondents.*

## BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## SUBJECT INDEX


| | Page |
|---|---|
| Counter Statement of the Case | 1 |
| A. Nature of the Case | 1 |
| B. Facts | 5 |
| Argument: | |
| 1. The Circulars Are Clearly Within the Rule-Making Power of HUD; The Court of Appeals Decision to that Effect Is in Accord with Decisions of This Court and Other Courts of Appeal and Presents No Important or Novel Question of Federal Law | 8 |
| 2. The Court of Appeals Decision With Respect to the Exemption of the HUD Circulars from the Notice Provisions of the Administrative Procedure Act Is in Accord With Decisions of This Court and Decisions of Other Courts of Appeal; In Light of HUD Voluntary Policy of Publication Noted in the Federal Register of March 4, 1971, The Decision in Any Event Presents No Important Question of Federal Law | 13 |
| Conclusion | 15 |
| Index to Appendix | 17 |
| Memorandum of Opinion and Order | RA-17 |
| Certificate of Service | RA-38 |


---

## CITATIONS

### Cases


| | |
|---|---|
| Almenares v. Wyman, 334 F. Supp. 512, 521 (S.D.N.Y. 1971) aff'd 453 F.2d 1075 (2 Cir. 1971) cert. denied, 405 U.S. 944 (1972) | 11 |
| Arizona State Department of Public Welfare v. Department of HEW, 449 F.2d 456 (9 Cir. 1971), cert. denied, 405 U.S. 919 (1972) | 11 |
| Brown v. Housing Authority of the City of Milwaukee, (7 Cir. No. 72-1259, Dec. 8, 1972) | 12 |
| Chicago Housing Authority v. Harris, 275 N.E.2d 353 (Ill. 1971) | 12 |
| Euresti v. Stenner, 458 F.2d 1115 (10 Cir. 1972) | 12 |
| Federal Security Administrator v. Quaker Oats, 318 U.S. 218, 228 (1943) | 9 |
| Glover v. Housing Authority of City of Bessemer, 444 F.2d 158 (5 Cir. 1971) | 12 |
| Hahn v. Gottlieb, 430 F.2d 1243, 1247 fn. 4 (1 Cir. 1970) | 15 |
| Housing Authority of City of Milwaukee v. Mosby, 192 N.W.2d 913 (Wis. 1972) | 12 |

## CITATIONS (Continued)


| | Page |
|---|---|
| Knox Hill Tenant Council v. Washington, 448 F.2d 1045, 1048 (D.C. Cir. 1971) | 11 |
| Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2 Cir. 1971) | 15 |
| Lazar v. Benson, 156 F.Supp. 259, 270 (E.D. S.C. 1957) | 15 |
| Lee v. Housing Authority of Elizabeth, N.J., 119 N.J. Super. 72, 290 A.2d 160 (N.J. Dist. Ct. 1972) | 12 |
| Lewis v. Martin, 397 U.S. 552, 559 (1970) | 9, 11 |
| Lewis v. Housing Authority of the City of Talladega, No. 76-106 (N.D. Ala. May 26, 1972) | 12 |
| Lowery v. Housing Authority of the City of West Palm Beach, No. 71-1956-Civ-CF (S.D. Fla., Sept. 11, 1972) | 12 |
| McElveen v. Pahokee Housing Authority, Inc., No. 71-1727 (S.D. Fla., June 5, 1972) | 12 |
| NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) | 15 |
| Perkins v. Lukens Steel Co., 310 U.S. 113, 129 (1940) | 14 |
| Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969) | 9 |
| Rodriguez v. Swank, 318 F.Supp. 289 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1971) | 15 |
| Serritella v. Engelman, 339 F.Supp. 738 (D. N.J. 1972) | 12 |
| Stroud v. Benson, 155 F.Supp. 482, 490 (E.D.N.C. 1957) | 15 |
| Texaco, Inc. v. F.P.C., 412 F.2d 740 (3 Cir. 1969) | 15 |
| Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) | 9, 10, 14 |
| Udall v. Tallman, 380 U.S. 1, 16-18 (1965) | 9 |
| Zemel v. Rusk, 381 U.S. 1, 11-12 (1965) | 9 |
| Zuber v. Allen, 396 U.S. 168 (1969) | 9 |


## AUTHORITIES


| | |
|---|---|
| D. Reich, Administrative Procedure Act: Analysis of its Requirements as to Rule-Making, 33 A.B.A.J. 315, 317 (1947) | 14 |
| Administrative Procedure Act, Section 4 | 5 |
| Administrative Procedure Act, §4(b) (A) (B) | 15 |
| Administrative Procedure Act §4(a) (2) | 15 |
| Administrative Procedure Act, Section 553(a) (2) | 5 |


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OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

*Petitioners,*

v.

UNITED STATES HOUSING AUTHORITY, et al., NATIONAL TENANTS ORGANIZATION, et al.,

*Respondents.*

## BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

### COUNTER STATEMENT OF THE CASE

#### A. Nature of the Case

This case involves the legality of two Department of Housing and Urban Development (HUD) Circulars which mandate that certain standards and procedures be adopted in all housing authorities with respect to their leases and the provision of grievance procedures, respectively. RHM 7465.8 requires in substance that housing authorities incorporate in leases: (1) standards of care with respect to both tenant and management; (2) remedies for management's

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egregious violations of its duties; (3) procedures for collection of monies owed, other than rent; and (4) delineation of "good cause" for eviction (R-1, pp. 90, 102).[1] RHM 7465.9 contains related procedural provisions which require that a tenant be offered an administrative hearing before an impartial hearing official or officials and be afforded an opportunity to cross-examine witnesses and fully present his case.

The housing authorities filed their complaint on July 22, 1971, alleging *inter alia* that the issuance of the above Circulars was invalid because they violated Congressional policy and the provisions of the Administrative Procedure Act (R-1, p. 1). On October 18, 1971 HUD answered and counter-claimed, alleging *inter alia* that the housing authorities' duty to comply with the terms of the Circulars and the time for the implementation thereof had run as of the date of HUD's filing (R-1, p. 10). Thereafter, Judge Denney granted tenants' motion for discretionary intervention on November 30, 1971, subject to their modifying the prayer contained in tenants' counter-claim, to conform to that of HUD (R-1, p. 202). By Order and Memorandum filed February 10, 1972, Judge Denney overruled HUD's and tenants' motions and granted plaintiffs' motion for summary judgment, declared HUD's Circulars invalid and enjoined HUD from enforcing same [A-1 through 14].[2]

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[1] "R." refers to the Record, which is contained in three volumes, the number indicates the particular volume in question.
[2] "A." refers to Petitioners' Appendix.

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The Court of Appeals for the Eighth Circuit, in an opinion filed September 28, 1972, reversed the judgments of the District Court and "remanded with directions to enter summary judgments on behalf of the defendants and intervenor parties upholding the validity of the Circulars" [A-38, 39]. On October 31, 1972, the Court of Appeals stayed its order pending the filing of the instant petition for a writ of certiorari.

Rejecting petitioners' argument that HUD's broad rule-making power was totally curtailed by the 1959 amendment to Section 1 of the United States Housing Act of 1937,[1] the Court of Appeals found that "HUD does have the ultimate supervision and authority in carrying out the provisions of the Housing Act" [A-30]. In interpreting Section 1 the Court found it "significant" that:

> . . . (1) there was not a complete transfer of authority to the local housing authorities, (2) although "administration" is not confined to budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with the National Authority to achieve uniformity in fulfilling the

[1]This section provides:

It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Act while effecting economies.

50 Stat. 888, as amended by Section 501 of the Housing Act of 1959, 73 Stat. 654, 679, 42 U.S.C. §1401.

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> objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy. When the latter occurs the real limitation to HUD's authority to act is whether its policies are reasonably related to carrying out Congress' expressed objectives to the low-rent housing program [Fn. 9 omitted] [A-31].

The Court went on to state:

> The background history leading up to the promulgation of the circulars clearly reflects a national concern as to the inequities in public housing throughout the nation. Although the Congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. [Fn. 10 omitted] [A-31, 32].

While noting that the grievance procedures (RHM 7465.9) might place a greater burden on local housing authorities, the Court held them permissible because they "do not inject HUD into day-by-day operations of the housing authority." This finding was based on two grounds: first, HUD has nothing to

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do with the detailed implementation of the grievance procedure, and second, the grievance procedure "may be invoked only when the local authority is alleged to have violated the actual terms of the lease." [A-29].

The second major issue discussed by the Court concerned HUD's obligation to comply with the notice provisions of Section 4 of the Administrative Prodcedure Act (APA).[4] Defendant and intervenors maintained that HUD Circulars are exempt from the notice provisions under Section 553(a)(2) of the APA which provides exemptions for matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

The Court below agreed. It narrowly construed the "public benefits" exemption to apply only to those regulations "directly involv[ing]" "excepted subjects" in which the government has a "proprietary or other unique interest" [A-35]. The Court found that the Annual Contributions Contract (ACC) between HUD and local authorities met both these requirements and that the HUD Circulars, as direct supplements to the ACC, were also within the exemption [A-34-36].

**B. Facts**

In December of 1969, the National Association of Housing and Redevelopment Officials (NAHRO), together with National Tenants Organization (NTO)

[4] 5 U.S.C. §553.

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and the National Housing and Economic Development Law Project, formed a task force at HUD's request and under its direction and supervision to develop a model lease and grievance procedure (R-1, pp. 48-49). NAHRO is the national representative of local housing authorities throughout the country. Its membership, consisting of 1,045 public housing authorities out of a total of 2,195, manage seventy-five percent of all existing public housing units (R-1, p. 49). The task force's deliberations continued for approximately one year and resulted in the issuance by HUD of the instant Circulars on February 22, 1971.

The fact that these deliberations were taking place was general knowledge in the public housing profession. The history of the negotiations was set forth in the NAHRO Information Service Bulletin that was sent to all housing authorities and individual members of NAHRO on December 21, 1970, and articles concerning the task force's progress in developing these Circulars appeared in issues of the professional housing magazine, The Journal of Housing, dated February 1970; March 1970; May-June 1970; August 1970; November 1970 and March 1971 (R-1, pp. 49, 50, 52). At the fifth meeting of the task force the final language of the grievance procedure Circular was agreed to; and at the sixth meeting, at the suggestion of the NAHRO representative, the final language for the lease was adopted (R-1, pp. 51-52).

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The agreed drafts of the Circulars were then presented to the NAHRO Housing Divisional Committee, which reviewed them section by section, and, after a few changes in language, approved them. This committee included representatives from petitioner housing authorities of the cities of Omaha, San Antonio and New Haven and the county of Contra Costa (R-1, pp. 51-52). Thereafter, the President of NAHRO advised HUD, on November 13, 1970, that the lease and grievance procedure had been ratified by the Executive Committee of NAHRO's Board of Governors. The Board of Governors includes a representative of petitioner Nashville Housing Authority as one of its members (R-1, p. 52). During this period, officials of individual petitioner housing authorities were members of the task force. For example, the Executive Directors of the housing authorities of New Haven and San Antonio took part in the meeting of November 5, 1970, at which the final agreement between NTO and NAHRO was reached (R-1, pp. 52-53).

Finally, a meeting was held on January 29, 1971 at the request of NAHRO, between Assistant Secretary for Housing Management Norman B. Watson and the Legal Issues Committee of NAHRO, at which representatives of several housing authorities including New Haven, San Antonio, Contra Costa and Kathryn M. Kuhla, General Counsel of the Chicago Housing Authority, had further occasion to make

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known their views and express their opposition to the actions of NAHRO's Executive Committee. This meeting delayed HUD's release date of the lease and grievance procedure Circulars until February 22, 1971 (R-1, p. 52). When issued it was intended that housing authorities be given a reasonable period of time to implement the Circulars and that they also be given another opportunity to make their views known with respect to them (R-1, p 54). However, after a period of over six months had elapsed, the Secretary found it necessary to determine that a reasonable time for implementation of the Circulars had elapsed (R-1, pp. 13-14, 54).

## ARGUMENT

### 1. The Circulars Are Clearly Within the Rule-Making Power of HUD; The Court of Appeals Decision to that Effect Is in Accord with Decisions of This Court and Other Courts of Appeal and Presents No Important or Novel Question of Federal Law

This case is another in a series involving the validity of regulations issued by an administrative agency under its general rule-making power. As the Court of Appeals noted [A-32], this Court has:

> . . . repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. [cases omitted] These considerations are especially appropriate where the review is of regulations of general application adopted by an adminis-

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> trative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. *Federal Security Administrator* v. *Quaker Oats*, 318 U.S. 218, 228 (1943).

See, e.g. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969); *Zuber* v. *Allen*, 396 U.S. 168 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

The Court of Appeals properly applied those maxims to the present case. It found that in promulgating the Circulars which recognize the rights of tenants as well as landlords, and which institute new grievance procedures designed to reduce friction and litigation, HUD was attempting to promote the objectives of the Housing Act by improving tenant-management relations and public housing environments. The Court determined that "[i]t is not unreasonable or arbitrary to expect that the new lease provisions and grievance procedures may bring about these desired goals" [A-32], and held that the Circulars were well within HUD's "ultimate authority" to "set overall policy" [A-31].

The decision below is in accord with *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969). As in *Thorpe*, the instant Circulars have been found to have a "reasonable relationship

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to the purposes for which HUD's rule-making power was authorized." 393 U.S. at 281 [A-27].

In arguing that the Circulars contravene Section 1 of the United States Housing Act of 1937,[5] petitioners attempt to turn *Thorpe* upside down, construing the case—which upheld the HUD Circular therein involved—as a holding that HUD regulations having more than a "minimal" or "insubstantial" effect upon the administration of public housing are invalid. No reading could be further from the mark. Surely if this Court had intended to prescribe a standard of "minimal effect" as the test of validity for HUD regulations affecting housing authority administration, it would not have left this intent—so drastically restrictive of the agency's regulatory authority in this area and so strikingly at odds with the tradition of judicial deference and hospitality to administration regulations—to be culled from a decision actually upholding the HUD Circular immediately before it. To the contrary, this Court in *Thorpe* plainly implied that if the regulation there involved proved ineffectual, HUD could impose a more stringent one. The *Thorpe* opinion states that "if the procedure followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing." 393 U.S. at 284, fn. 48.

[5] 50 Stat. 888, as amended by §501 of the Housing Act of 1959, 73 Stat. 679, 42 U.S.C. §1401.

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As the Court of Appeals held:

> Although the Congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. In fact, the legislative history reads to the contrary. HUD has a responsibility to police performance of its contracts so that decent, safe and sanitary character of public dwellings is maintained in accordance with the purposes of the Housing Act. See *Knox Hill Tenant Council* v. *Washington*, 448, F.2d 1045, 1048 (D.C. Cir. 1971) [A-33].[9]

Not only is the Court of Appeals decision in accord with *Thorpe* but it follows other decisions of this Court and other Courts of Appeal in cases involving substantially the same statutory scheme. See *Lewis* v. *Martin, supra; Arizona State Department of Public Welfare* v. *Department of Health, Education and Welfare*, 449 F.2d 456 (9 Cir. 1971), cert. denied, 405 U.S. 919 (1972); *Almenares* v. *Wyman*, 334 F.Supp. 512, 521 (S.D.N.Y. 1971) aff'd 453 F.2d

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[9] In addition, the Court below held premature petitioner's constitutional argument with respect to the effect of HM 7465.1 Supp. 2, citing this Court's observation in *Thorpe* that:

> We do not sit, however, "to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision." 393 U.S. at 284 (A-37).

Again based on this Court's view is *Thorpe* the Court of Appeals noted:

> The trial court did not pass on local authorities' remaining objection that HUD's promulgation of the circulars unlawfully alter the ACC contract. We find little merit to this argument. See *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. at 280 n. 35 [A-37 fn. 17].

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1075 (2 Cir. 1971) cert. denied, 405 U.S. 944 (1972); *Euresti* v. *Stenner*, 458 F.2d 1115 (10 Cir. 1972); *Serritella* v. *Engelman*, 339 F.Supp. 738 (D.N.J. 1972).

Finally, all Courts which have examined the instant Circulars have found them to be valid. Indeed, in a recent case involving identical issues as here presented, the Court of Appeals for the Seventh Circuit, on the basis of similar reasoning to that of the Court below, upheld HUD's issuance of the Circulars. *Brown* v. *The Housing Authority of the City of Milwaukee*, (7 Cir., No. 72-1259, Dec. 8, 1972) [RA-1].[7] See also *Glover* v. *Housing Authority of City of Bessemer*, 444 F.2d 158 (5 Cir. 1971); *Housing Authority of City of Milwaukee* v. *Mosby*, 192 N.W. 2d 913 (Wis. 1972); *Chicago Housing Authority* v. *Harris*, 275 N.E. 2d 353 (Ill. 1971); *Lewis* v. *Housing Authority of the City of Talledega*, No. 76-106 (N.D. Ala. May 26, 1972) [RA-11]; *McElveen* v. *Pahokee Housing Authority, Inc.*, No. 71-1727 (S.D. Fla., June 5, 1972) [RA-17]; *Lowery* v. *Housing Authority of the City of West Palm Beach*, No. 71-1956-Civ-CF (S.D. Fla., Sept. 11, 1972) [RA-20]; and *Lee* v. *Housing Authority of Elizabeth, N.J.*, 119 N.J. Super. 72, 290 A.2d 160 (N.J. Dist. Ct. 1972).

[7] "RA." refers to this Respondent's Appendix.

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**2. The Court of Appeals Decision With Respect to the Exemption of the HUD Circulars from the Notice Provisions of the Administrative Procedure Act Is in Accord With Decisions of This Court and Decisions of Other Courts of Appeal; In Light of HUD Voluntary Policy of Publication Noted in the Federal Register of March 4, 1971, The Decision in Any Event Presents No Important Question of Federal Law**

It should be noted at the outset that the issue of whether HUD has a duty to give notice of intent to promulgate regulations in the Federal Register in compliance with Section 4 of the Administrative Procedure Act (APA)[8] has a very limited applicability—namely only to the case at bar.[9] For on March 4, 1971, two weeks after promulgation of the instant Circulars, HUD published the following statement in the *Federal Register:*

> §10.1 Policy.
>
> It is the policy of the Department to formally promulgate its rules and regulations, to give to the public notice concerning them, and to afford, wherever practicable, to all who may be affected by them an opportunity to participate in their formulation through submission of written comments prior to their effective date.[10]

Section 10.3[11] of the published statement defined "rules and regulations" as meaning "the formally promul-

[8] 5 U.S.C. §533.
[9] In this regard, as noted earlier (supra p. 4-5), it was general knowledge in the public housing profession that a HUD Task Force was meeting to develop the instant Circulars.
[10] 24 C.F.R. §10.1 (1971).
[11] 24 C.F.R. §10.3 (1971).

TOO CLOSE IN CENTER

gated statements of the Department which are required to be included in the Department's Unified Issuances System in the form of Handbooks, Circulars, or Guides."

In any event, the decision below was plainly correct. The Circulars were exempt from the APA notice provisions by Section 4(a)(2) of that Act for they deal with "a matter relating to agency management or . . . to public . . . loans, grants, benefits or contracts." This Court in *Thorpe* found that HUD Circulars like these directly supplement the Annual Contributions Contract. 393 U.S. at 275. It follows that the Court of Appeals was correct in finding that the comparable instant Circulars here are exempted under §4(a)(2) of the APA [A34-36].

As this Court held in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129 (1940), and as the Court of Appeals noted:

> Government must be free from vexatious restraints which interfere with the manner in which it may dispatch its own internal affairs. To insure that the notice provisions of the APA would not be used in a similar manner to restrain the government's administration of public contracts, Congress included the exemption. See D. Reich, *Administrative Procedure Act: Analysis of its Requirement as to Rule-Making*, 33 A.B.A.J. 315, 317 (1947) [A-35].

Contrary to petitioners' contention, other decisions of Courts of Appeal are to the same effect. See

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*Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2 Cir. 1971); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1247 fn. 4 (1 Cir. 1970). See also *Stroud* v. *Benson*, 155 F.Supp. 482, 490 (E.D.N.C. 1957); *Lazar* v. *Benson*, 156 F.Supp. 259, 270 (E.D. S.C. 1957); *Rodriguez* v. *Swank*, 318 F.Supp. 289 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1971).

The cases which petitioners assert to be in conflict are inapposite to the case at bar. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) involved Section 6 of the National Labor Relations Act which, unlike the governing statute here, specifically provides that the NLRB shall issue its regulations "in the manner prescribed by the Administrative Procedure Act."[11] And *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740 (3 Cir. 1969) involved exemptions under §4 (b) (A) (B) of the APA, not exemptions under §4 (a) (2).

## CONCLUSION

The Court of Appeals fully considered and rejected petitioners' specific challenges to the Circulars. The Court's comprehensive and well reasoned opinion is in accord with applicable decisions of this Court as well as other Courts of Appeal decisions, and

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[11] 394 U.S. 759, 763 (1969). Section 6 provides that:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act. 29 U.S.C. §156.

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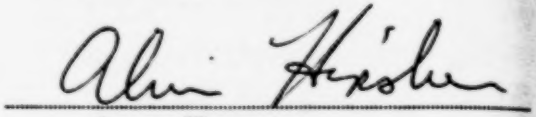
presents no federal question which requires the scrutiny of this Court.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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December 26, 1972

COPY BOUND TO

# APPENDIX

## INDEX TO APPENDIX


Page

Opinion of the Court of Appeals for the Seventh Circuit, December 8, 1972, Brown v. The Housing Authority of the City of Milwaukee, et al. ..... RA-1

Memorandum of Opinion and Order, U.S. District Court for the Northern District of Alabama, May 26, 1972, Lewis v. The Housing Authority of the City of Talladega, Alabama, et al. RA-17

Order of the U.S. District Court for the Southern District of Florida, June 5, 1972, McElveen v. Pahokee Housing Authority, Inc., et al. ..... RA-27

Order of the U.S. District Court for the Southern District of Florida, September 11, 1972, Lowery v. The Housing Authority of the City of West Palm Beach, Florida, Inc., et al. RA-31


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# In The
# United States Court of Appeals
## For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1259

LOUISE BROWN, individually and on behalf of all other persons similarly situated,
*Plaintiffs-Appellees,*

v.

THE HOUSING AUTHORITY OF THE CITY OF MILWAUKEE, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Eastern Division of Wisconsin.
No. 71 C 512
MYRON L. GORDON, *Judge*

ARGUED NOVEMBER 2, 1972

DECIDED DECEMBER 8, 1972

Before KILEY and SPRECHER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge*, Louise Brown brought an action on her own behalf and on behalf of all tenants in federally-assisted low-rent public housing projects owned and operated by the Housing Author-

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

ity of the City of Milwaukee seeking declaratory and injunctive relief against termination of tenancies without compliance with certain required hearing procedures prior to the termination. The summary procedure used by the Authority was alleged to be in violation of circulars and regulations promulgated under the United States Housing Act of 1937 and to violate procedural guarantees secured by the due process clause of the Fourteenth Amendment of the United States Constitution. The district court granted plaintiff's motion for judgment on the pleadings, holding that the Housing Authority eviction procedure did not comply with requirements of due process and was in violation of valid regulations promulgated by the Department of Housing and Urban Development pursuant to authority given by the Housing Act of 1937. 340 F. Supp. 114 (E.D. Wis. 1972). We agree that the Housing Authority eviction procedure is invalid under lawful HUD regulations. We therefore need not decide whether the procedure used by the Milwaukee Housing Authority also violates fundamental principles of due process. *See Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 283-84 (1969).

This action was begun following the action of the Housing Authority's agent who, on August 9, 1971, served plaintiff Brown with a "Notice to Tenant Terminating Tenancy," requiring her to vacate her apartment by September 30, 1971. The notice did not contain a written statement of the reasons for

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eviction, although Brown was apparently given an oral statement, and her subsequent request for a written reason was refused by the Housing Authority.

On February 22, 1971, well before Brown's eviction notice, the Department of Housing and Urban Development, Renewal and Housing Management division, issued HUD circular RHM 7465.9. This circular requires local housing authorities receiving federal funds to adopt grievance procedures incorporating certain standards set forth in the circular. These standards had been determined following meetings of representatives of local housing authorities, tenants, professional arbitrators and other interested organizations. The stated purpose of the new regulations was to "improve management-tenant relationships and promote improved housing environment to the advantage of the low-rent public housing program thus implementing the national housing policy as expressed by Congress." In order to achieve this objective, each local housing authority was required to set up a grievance procedure in which, as a minimum, each tenant would be given an opportunity for a hearing before an impartial official or panel before the local housing authority takes any action adversely affecting a tenant's "rights, duties, welfare or status." At the hearing the tenant is to be afforded the right to present his side of the dispute, to bring in witnesses, to confront and cross-examine witnesses in appropriate circumstances, and to be represented by counsel or another person of his choice. Following

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a decision on the dispute, the parties are to be notified in writing of the decision and given the reasons and evidence relied upon in reaching the decision. The local housing authority is free to pursue its remedies following a decision in its favor and the tenant may seek appropriate relief.

The Milwaukee Housing Authority does not deny that it did not follow the procedure outlined in the circular in Brown's case or an any other case, but insists that it was not required to do so for several reasons. First, the Housing Authority insists that the circular is invalid because it exceeds the authority given HUD under the Housing Act of 1937, 50 Stat. 888, as amended, 42 U.S.C. §1401. Second, the defendant argues that RHM 7465.9 is not binding upon it because HUD failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §553(b), which provides that notice of proposed rule-making shall be published in the Federal Register. Finally, it is argued that even if the HUD circular is valid and binding, it does not require an administrative hearing prior to eviction.

## I

The defendant Housing Authority's argument that HUD circular RHM 7465.9 exceeds HUD's authority under the Housing Act of 1937 is based on that part of 42 U.S.C. §1401 which states: "It is the policy of the United States to vest in the local public hous-

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ing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of . . . [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies." The Supreme Court considered this provision in *Thorpe* v. *Housing Authority of the City of Durham, supra,* determining the validity of an earlier HUD circular requiring that a tenant be told the reasons for his eviction and given an opportunity to reply, and held that the HUD circular was not inconsistent with that policy and had only a minimal effect upon the basic lease agreement between the Housing Authority and its tenants. The Housing Authority argues that this circular is distinguishable because it "goes to the root of every local Authority's relations with its tenants and constitutes a far greater encroachment upon every local Authority's power and responsibilities" than did the circular approved in *Thorpe.* We do not agree.

This circular was issued pursuant to the broad rule-making authority given HUD under 42 U.S.C. §1408, which authorizes HUD to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter." There can be no doubt that the circular in question bears a reasonable relation to this authority. Section 1401 states that it is the policy of the United States "to promote the general welfare of the Nation by

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employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . ." In *Thorpe, supra*, 393 U.S. at 281, the Supreme Court stated:

> "One of the specified purposes of the federal housing acts is to provide 'a decent home and a suitable living environment for every American family' [42 U.S.C. §1441] that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal."

Additional authority for the HUD circular is contained in 42 U.S.C. §1410(a), which provides that HUD "may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects." The Annual Contributions Contract, which defines the contractual relationship between HUD and the local housing authority, provides pursuant to this provision:

> Sec. 101: Each Project . . . will be developed and administered to promote serviceability, efficiency, economy, and to achieve the economic

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and social well-being and advancement of the tenants thereof.

• • • •

Sec. 201: The Local Authority shall at all times operate each Project 1) solely for the purpose of providing decent, safe, and sanitary dwellings . . . , 2) in such manner as to promote serviceability, efficiency, economy, and stability, and 3) in such manner as to achieve the economic and social well-being of the tenants thereof.

• • • •

Sec. 203: The Local Authority shall not permit any family to occupy a dwelling in any Project except pursuant to a written lease . . . which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause.

The HUD circular promotes the policies outlined in the federal housing act and the contributions contract in two ways. First, as the Supreme Court noted in *Thorpe, supra*, a procedure designed to protect a tenant's right to continued tenancy clearly furthers the goal of providing a decent home to Americans who lack the financial means to otherwise live in a suitable living environment. Second, the hearing procedure is reasonably related to the protection of HUD's financial contribution to the project. This relationship is noted in the background paragraph of RHM 7465.9, which states:

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> "In recent years, it has become more and more apparent that many of the problems faced by management and tenants in low-rent public housing have resulted in friction and strain in tenant-management relations and in litigation, costly to both management and tenants; much of which might have been avoided had some kind of procedure been available for grievances to be aired before an impartial individual or panel."

Others have noted the relationship between proper management and the financial success of a housing project. *See* Mulvihill, "Problems in Management of Public Housing," 35 Temp. L.Q. 163 (1962). An harmonious landlord-tenant relationship is obviously in the interests of those who have a financial stake in the success of the project.[1]

The Housing Authority's argument that the sentence in section 1401 vesting "the maximum amount of responsibility in the administration of the low-rent program" in the local housing authority precludes HUD's mandating a grievance procedure such as outlined in HUD circular RHM 7465.9 is also belied by the further clause in that sentence which subjects the local housing authority's right to establish rents and eligibility requirements to HUD's approval. That is essentially what has occurred here. HUD, in its capacity as the final authority on eligi-

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[1] 42 U.S.C. §1410(c) provides that HUD's financial contribution can vary with the financial success of the housing authority.

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bility requirements, has implemented a policy which furthers the goals of the housing act and protects its own interest in seeking to provide suitable housing for every American.

Finally, we reject the notion that the grievance procedure required by the HUD circular alters the basic lease agreement between the Authority and its tenants. The Annual Contributions Contract between HUD and the Authority requires that each local authority negotiate a written lease with its tenants "which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause." The circular challenged here merely protects the tenant's right to continued tenancy in the absence of good cause for termination of the lease.[2]

We conclude that HUD circular RHM 7465.9 is well within the broad rule-making authority vested in HUD to further the goals of the Housing Act of 1937. *Accord, Housing Authority of the City of Omaha* v. *United States Housing Authority*, Nos. 72-1102 and 72-1185 (8th Cir. September 28, 1972); *Chicago Housing Authority* v. *Harris*, 49 Ill.2d 274, 275 N.E.2d 353 (1971). *See also Glover* v. *Housing Authority of the City of Bessemer*, 444 F.2d 158 (5th

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[2]We regret the Housing Authority's argument that the circular violates the Housing Authority's rights under the due process clause of the Fifth Amendment by authorizing HUD to repudiate its obligations under the annual contributions contract, for similar reasons. *See Thorpe* v. *Housing Authority of the City of Durham*, *supra*, 393 U.S. at 278-79.

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Cir. 1971); *Housing Authority of the City of Milwaukee*, 53 Wis. 2d 275, 192 N.W.2d. 913 (1972).

II

The HUD circular challenged here was promulgated without compliance with 5 U.S.C. §553(b), the general notice provision of the Administrative Procedure Act. Plaintiff argues that compliance with this provision was not required because defendants had actual notice of the proposed regulation.[5] We need not decide this question because we agree with the United States, which filed a brief as amicus curiae, that the exception to the notice provision contained in 5 U.S.C. §553(a) is applicable here. Section 553(a) provides, in part, that:

> "This section applies . . . except to the extent that there is involved—
>
> • • • •
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts."

[5] 5 U.S.C. §553(b) requires publication of general notice of proposed rule-making in the Federal Register "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." The defendants did not deny that they had notice of the proposed circular. The procedure leading up to the standards promulgated in the HUD circular is strong evidence that the defendants did have such notice. The meetings which culminated in the grievance procedure outlined in the HUD circular began in December, 1969. At the first meeting, an "ad hoc" task force, consisting of representatives of the National Association of Housing and Redevelopment Officials (NAHRO), which is the national representative for member housing authorities across the nation, representatives of the National Tenants Organization (NTO), and others, was established to develop a model lease and grievance procedure. After each meeting of this task force, drafts were prepared by HUD and sent to NTO and NAHRO for circulation to their members for comment. It would thus appear likely that the defendant did have actual notice of the proposed rule-making.

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HUD circular RHM 7465.9 was promulgated to supplement the Annual Contributions Contract between HUD and the local housing authority. *See Thorpe* v. *Housing Authority of the City of Durham, supra*, 393 U.S. at 274-75. It is therefore specifically exempted from the notice provisions of the APA as "a matter relating to . . . contracts." *Chicago Housing Authority* v. *Harris, supra*, 275 N.E.2d at 355.

The defendant argues that the contract exemption applies only where the agency is acting in its "proprietary" capacity as an individual citizen concerned with its own property, funds or contracts. However, as the court in *Housing Authority of the City of Omaha* v. *United States Housing Authority, supra*, slip opinion at 13, stated, the Annual Contributions Contract does represent a governmental proprietary interest "in that it effectuates the government's stewardship over public housing projects which are purchased with public funds."

Two recent cases decided by the First and Second Circuits involved similar problems under Section 221 of the National Housing Act, 12 U.S.C. §1715*l*. Both courts held that the rule-making procedures of the APA did not apply because of the exception in Section 553(a) for a matter relating to agency loans, grants, benefits or contracts. *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1247 n. 4 (1st Cir. 1970).

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Inasmuch as the notice provision of the APA is inapplicable to the HUD circular, the grievance procedure contained in the circular was lawfully promulgated and is binding upon the defendant Housing Authority.

## III

The Milwaukee Housing Authority argues that even if the HUD circular is valid and binding it does not require an administrative hearing. Focusing on the language of the circular which calls for a hearing before an "impartial official or a hearing panel," the Authority insists that a hearing before a state judge in an action for unlawful detainer sufficiently complies with the requirements of the circular.

This argument ignores the fact that the Wisconsin Supreme Court has itself held that the Wisconsin unlawful detainer procedure does not comply with the mandates of the HUD circular. In *Housing Authority of the City of Milwaukee* v. *Mosby*, *supra*, a tenant evicted from a housing project following a judicial hearing pursuant to the state unlawful detainer statute, Wis. Stat. Ann. §291.07, appealed on the ground, among others, that the promulgation of HUD circular RHM 7465.9 required that she be given an administrative hearing. The Wisconsin Supreme Court agreed, stating:

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> "[The circular] provides for an administrative method of advising tenants of violations and making factual determinations of whether such violations exist and whether they are of such nature as to require eviction. It also provides a means whereby a neutral person or body of persons can attempt to discuss the problems with the objective of saving the tenancy. Eviction is hardly consistent with public interest in providing housing for low income persons. . . . We conclude that the hearing requirement of the HUD circular of February 22, 1971, is valid and mandatory upon the housing authority." 192 N.W.2d at 917.

We agree with the Wisconsin Supreme Court that a state judicial action for unlawful detainer does not comply with the grievance procedure outlined in the HUD circular. *Accord, Glover* v. *Housing Authority of the City of Bessemer, supra,* 444 F.2d at 162.

## IV

The final argument in this appeal relates to the propriety of a class action in this case. The district court held that the action was properly maintainable as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The defendant Housing Authority insists that a class action is not proper because not all housing projects owned and operated by the Housing Authority are federally-aided and

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the class combined tenants terminated for nonpayment of rent with tenants terminated for good cause.

The district court did not in terms limit the class to those tenants living in federally-aided low-income public housing. However, the very nature of its decision, applying the HUD circular to the tenant class, indicates that the court intended to include only tenants in federally-aided public housing. The pleadings and briefs also indicate that no relief was sought for tenants in low-income housing which does not receive federal aid.

Neither does the failure of the district court to specify whether the class included tenants terminated for nonpayment of rent defeat the class action. Although the HUD circular held binding upon the Housing Authority certainly contemplates that a hearing will be held in cases in which a tenancy is sought to be terminated on account of the nonpayment of rent,[4] plaintiff's complaint is limited to tenants whose leases may be terminated for "good cause." Complaint, paragraphs 4 and 10. Thus, although we see no reason why the class could not have been drawn to include all federally-aided public housing tenants in Milwaukee,[5] the fact that it was not does not affect the validity of the class action.

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[4]See HUD circular RHM 7465.9, appendix 1, "Model Grievance Procedure," paragraph 5(d). See also HUD circular RHM 7465.8, appendix 1, "Model Lease Form," paragraph 10, which requires a 30-day notice prior to termination for all causes, including the nonpayment of rent.

[5]*See Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 867 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

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The decision of the district court is affirmed.

AFFIRMED.

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Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

EVERLINE LEWIS, et al.,
*Plaintiffs;*

VS.

THE HOUSING AUTHORITY OF THE CITY OF TALLADEGA, ALABAMA; et al.,
*Defendants.*

CIVIL ACTION No. 67-106

**MEMORANDUM OF OPINION AND ORDER**

If time cures ills, it also permits new problems to arise. This memorandum focuses on the proceedings in this cause after its assignment to the undersigned in August 1971. The judicial background, however, covers some five years and is briefly summarized chronologically in the appendix hereto.

On August 18, 1971, a pretrial conference was held, at which time it was agreed that there were two remaining issues for decision in the case: (1) the procedural steps taken on the eviction of tenants (*i.e.*, due process requirements), and (2) whether by its actions the defendant housing authority was maintaining segregated housing facilities. The plaintiffs were directed to tender to defendants by October 1, 1971, a detailed narrative of the facts considered by them as relevant to such issues, with provision for submission to the court of a composite

stipulation of such facts as the parties could agree upon.

In the "Plaintiffs' Statement of the Case," filed October 15, 1971, they state:

> Since the inception of this suit, it appears that defendants have taken steps to comply with HUD regulations regarding equal access regardless of race, color or creed to federally financed housing. Defendants have since 1970 actively offered vacancies in both projects under their jurisdiction to white and black applicants. While there are currently no white persons in the Knoxville Homes, there are at least two black families at the present time in the Curry Court development. Two additional projects are planned for the future and the housing director has testified on deposition that these facilities will be advertised as open to the entire community regardless of race and that they have selected a site for at least one of the projects which will insure a racial mix. It may be possible to eliminate the necessity of trial of this issue if the parties are able to agree upon a consent decree by which the defendants would agree to continue current efforts to integrate the projects and would file periodic reports with the court in that regard.

The defendants acknowledge their obligation under the Constitution and laws of the United States to operate the housing projects now existing or here-

after constructed in a racially non-discriminatory manner. They ask, however, that this obligation not be expressed in the form of an injunction, asserting that such would unnecessarily expose them to the abbreviated procedures of a contempt citation instituted by a disgruntled applicant. The court is in accord with this request, and concludes that the defendants should not be shackled with an injunction which no evidence suggests is needed. Accordingly, so far as this aspect of the case is concerned, it is the ORDER of this court, in the nature of a declaration of rights, that it is the obligation and duty of the Housing Authority of the City of Talladega, Alabama, to operate and maintain on a racially desegrated basis its housing projects and to take whatever steps as may be necessary or proper from time to time to achieve that end. In particular, future advertisements of vacancies or application procedures should clearly indicate that its housing projects are open to all applicants without regard to their race, color, creed, or national origin.

The plaintiffs also ask that the defendants be required to implement HUD Circulars 7465.6 and 7465.8. These regulations purport to require housing authorities to eliminate from, or include in, their leases certain provisions in order to remedy burdens on public housing tenants considered by HUD to be unfair. It is unnecessary to pass on the validity of these regulations in order to resolve the questions over eviction procedures. While it is true that the

original and amended complaints sought compliance with applicable governmental regulations, the thrust was directed to regulations for racially open housing. No suggestion was made at the pretrial conference in August 1971—more than six months after promulgation of the later of these two regulations—that the plaintiffs were interested in declaratory or injunctive relief regarding these regulations. The court, if not the defendants, was first apprised of any question regarding these regulations on October 15, 1971, when the plaintiffs filed their statement of the case in anticipation of a trial shortly thereafter. By that time there had already been filed in the United States District Court for Nebraska a class action challenging on behalf of all public housing authorities the viability of RHM 7465.8 and 7465.9. The Nebraska action, *Housing Authority of the City of Omaha, et al.* v. *United States Housing Authority, et al.*, has since resulted in a district court ruling approving the class action and invalidating 7465.8 and 7465.9 as mandatory requirements. The court here concludes, particularly in the light of the pendency of another case questioning 7465.8—and the viability of 7465.6 is closely related thereto—, that the plaintiffs should not be allowed to expand the issues in the present case after the pretrial conference. Accordingly, the plaintiffs' claim related to 7465.6 and 7465.8 is denied, without prejudice however to the presentation in another suit (if not in the Nebraska case now on appeal) of their purported rights thereunder.

A different question is presented as regards 7465.9, however. This is the regulation that spells out a procedure for handling grievances and tenant complaints. So far as it pertains to eviction procedures, it is clearly within the scope of the pretrial order. For such purpose it has been approved by the Fifth Circuit in *Glover* v. *Housing Authority of Bessemer*, 444 F.2d 158 (1971). It may be that the Fifth Circuit's approval came without the benefit of full briefing and argument; but until the Circuit retracts from its decision (or until a contrary position is taken by the Supreme Court, as may occur in future proceedings in the Nebraska case), this court concludes that the decision in *Glover* should be taken at face value. The past history in this case indicates moreover a need for a judicial mandate in order to protect the tenants of the Talladega Housing Authority against evictions in violation of precedural due process.

Accordingly, it is ORDERED that the Housing Authority of the City of Talladega, Alabama, and its Executive Director, and their officers, agents, servants, employees and attorneys are hereby enjoined to forthwith put into effect as relates to future evictions the procedures outlined in the Department of Housing and Urban Development Circular RHM 7465.9. This shall include a hearing before an impartial official or hearing panel (with representation of tenants on any such panel if "management" representatives are appointed); notice prior to the hear-

ing of the reasons or grounds for the proposed eviction; opportunity at such hearing to present witnesses, cross-examine adverse witnesses, and to be represented by counsel or another person of his choice; and notification in writing of the decision and the reasons therefor. The regulation indicated and this order permit the appointment of an impartial official to conduct such hearing and make such decision in lieu of a "hearing panel"; but the court declines to rule in this proceeding whether some particular person would or would not be such an "impartial official."

The court recognizes that later events, such as subsequent decisions by the Supreme Court or the Fifth Circuit Court of Appeals, may provide a basis for the defendants' seeking a modification or dissolution of this injunction. However, until such action is taken, the injunction herein provided is to continue in force.

The parties shall bear their own costs.

DONE, this the 26th day of May, 1972.

SAM C. POINTER, JR.
United States District Judge

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APPENDIX TO MEMORANDUM, Lewis et al. v. Talladega Housing Authority et al., U.S.D.C., No. Dist. Ala., No. 67-106-E.

December 1, 1964. Effective date of rule adopted by Talladega Housing Authority (THA) that birth of illegitimate child automatically causes eviction of tenant and her family.

January 23, 1967. Letters received by two plaintiffs to vacate within ten days (presumably for violation of rule against illegitimate births).

February 7, 1967. Issuance of HUD circular requiring that tenants be given reasons for proposed evictions, an informal conference, and an opportunity to reply or explain.

February 10, 1967. Complaint filed in this court challenging (1) eviction of plaintiffs, (2) validity of "illegitimacy" rule, (3) compliance with procedural due process in evictions, (4) operation of projects on a racially segregated basis, and (5) compliance with federal regulations for operation of federally funded public housing projects. TRO issued by court halting the threatened evictions.

April 17, 1967. Decision in *Thorpe* v. *Housing Authority of City of Durham*, 386 U.S. 670 (1967). The Supreme Court, taking note of (but not deciding whether it would be binding on housing authori-

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ties) HUD's February 1967 circular, implies that the procedures therein specified for evictions would satisfy due process requirements.

May 31, 1967. THA revokes prior eviction notices to the two plaintiffs.

July 14, 1967. Order of this court dismissing, without prejudice, this action for mootness. It was noted that THA stated in open court that it was complying with HUD's February 1967 circular.

August 3, 1967. Notice of appeal to Fifth Circuit. The plaintiffs complain that the "illegitimacy" rule was still "on the books" and that other aspects of their complaint had never been heard.

May 29, 1968. THA rescinds "illegitimacy" rule and adopts five standards regarding "desirability" of tenants for admission or continued occupancy.

June 26, 1968. Decision of Fifth Circuit, 397 F.2d 178, remanding case because "there remain allegations in [plaintiffs'] complaint which are entitled to be heard" and because trial court should pass on their charge that the new "desirability" standards were unconstitutionally vague.

August 19, 1968. Amended complaint attacks vagueness of "desirability" standards, compliance with procedural due process in evictions, operation

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of projects on racially segregated basis, and compliance with appropriate federal regulations.

July 7, 1970. Intervention on behalf of third tenant, claiming to have received notice of eviction for rumored misbehavior of her children but without any hearing and without being given names of "informers."

July 15, 1970. This court after hearing directs THA to readmit the intervening plaintiff as a tenant for failure to afford procedural due process in her eviction. The court suggests that THA adopt procedures for evictions including written notice of charges, and of a hearing with opportunity to produce evidence to refute the charges.

August 10, 1970. HUD promulgates RHM 7465.6, prohibiting the inclusion of certain provisions in public housing leases.

December 10, 1970. Order of this court holding the "desirability" standards not facially void for vagueness or overbreadth. The court notes that two issues remain: the due process issue in eviction proceedings and whether THA is throwing any "roadblocks" in the process of desegregating its projects.

February 22, 1971. HUD issues RHM 7465.8 and 7465.9, the first establishing criteria for provisions to be inserted in leases and the second outlining

TOO CLOSE IN CENTER

procedures for handling grievances and tenant complaints, including eviction procedures.

June 9, 1971. Decision in *Glover* v. *Housing Authority of Bessemer*, 444 F.2d 158 (5th Cir. 1971). The Fifth Circuit remands that case with instructions that the evicted tenant be reinstated in the project, subject to eviction proceedings held in compliance with RHM 7465.9.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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| ROY LEE MCELVEEN, et al., *Plaintiffs*, v. PAHOKEE HOUSING AUTHORITY, INC., et al., *Defendants.* | No. 71-1727-Civ-CF ORDER |

This cause came before the Court upon the Court's order for a conference with counsel, and upon defendant's motions to dismiss and for a continuance, and plaintiff's Barnes motion for a summary judgment. The Court has heard argument of counsel. A transcript of the hearing before the Court shall be prepared by the Court's Official Court Reporter, to be taxed as costs at the conclusion of this cause, and is hereby incorporated by reference into this order. Thereupon, it is

ORDERED and ADJUDGED as follows:

1. Defendant's motion to dismiss is hereby denied;

2. Defendant's motion for a continuance is hereby denied;

3. Upon stipulation of counsel for the plaintiffs, this cause shall stand dismissed as to plaintiffs Willie

Joe Lewis and Ernestine Lewis. These plaintiffs have failed to comply with the stipulation of counsel incorporated in the Court's order of December 10, 1971, in that they have not paid back rent nor have they been reinstated as tenants of the defendant Housing Authority;

4. On the basis of *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 277 (1969), this Court finds that Circulars RHM 7465.8 and 7465.9, model lease and grievance procedures, are mandatory and must be adopted by the Housing Authority;

5. Upon the basis of *Glover* v. *Housing Authority*, 444 F.2d 158 (5th Cir. 1971), this Court finds that Circulars RHM 7465.8 and 7465.9 are validly imposed upon the Housing Authority by H.U.D.;

6. The Court finds no conflict between state law and the model lease and grievance procedure in question. Florida Statute §421.21 specifically authorizes "every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the . . . operation of any housing project by such authority;"

7. The Court finds, and counsel have stipulated, that there remain no material questions of fact and this cause may be resolved upon a motion for summary judgment;

8. Plaintiff Barnes' motion for summary judgment is hereby granted;

9. Plaintiffs request that this cause be maintained as a Rule 23, Fed.R.Civ.P., class action is hereby denied; however, for all intents and purposes, the law established here will be the rule of the Court with regard to the Housing Authority's relationship with all tenants;

10. Counsel for the plaintiff shall prepare and submit for the Court's consideration a summary and final judgment form, including therein a model lease and grievance procedure which meets the mandates of Circulars RHM 7465.8 and 7465.9. Counsel may wish to confer upon this prior to submission. The Court suggests counsel utilize that lease and grievance procedure which had been agreed upon by counsel prior to the defendants' May 18, 1972, resoultion rescinding said agreement, and incorporate therein the Court's rulings and counsel's agreements about those previously unresolved points, particularly the following:

(a) The Tenants Hearing Board should be well balanced. Two tenants, two Housing Authority representatives and a fifth person to be selected by those four appears proper;

(b) The Tenants Hearing Board's decisions should be subject to judicial review, but, aside from that, the Board's decisions should be final;

(c) Interest should be paid upon a tenant's security deposit. This will be required by

Florida Law as of October 1, 1972. Ch. 72-43, Florida Laws (March 9, 1972), amending §83.261(2), Florida Statutes;

(d) Counsel for the defendant will voluntarily withdraw section 7 of the proposed lease which concerns so-called "constructive abandonment" by the tenant.

DONE and ORDERED at Miami, Florida, this 5th day of June, 1972.

CHARLES B. FULTON
Chief Judge

cc: U.S. Attorney
David M. Cherry, Esq.
Don T. Adams, Esq.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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| WILLIS LOWERY, *Plaintiff*, v. THE HOUSING AUTHORITY OF THE CITY OF WEST PALM BEACH, FLORIDA, INC., et al., *Defendants.* | No. 71-1956-Civ-CF ORDER |

This cause came before the Court upon plaintiff's motion for summary judgment. Plaintiffs' motion was filed on August 3, 1972. To date, the defendant Housing Authority of the City of West Palm Beach has not filed a response to plaintiff's motion; however, the United States has responded stating it does not oppose plaintiff's motion.

This civil rights cause was instituted on December 28, 1971, by the plaintiff Willis Lowery against the Housing Authority of West Palm Beach. The plaintiff Lowery is a tenant in a Housing Authority dwelling. The basis for his claim against the Housing Authority was that the Housing Authority had instituted eviction proceedings against him without notice and without first complying with certain circulars and transmittal notices sent to the Housing Authority and requiring certain criteria for terminations including notice and an administrative hearing before a hearing panel composed of two Housing

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Authority personnel, two tenants, and one other impartial person selected by the first four. The plaintiff contended that H.U.D. Circulars RHM 7465.8 and 7465.9, Model Lease and Grievance Procedure, were and are mandatory and must be implemented by the Housing Authority, and that the plaintiff's tenancy in this publicly financed and administered housing facility cannot be terminated without affording the plaintiff due process of the law by way of an administrative hearing before a hearing panel composed as stated above and in accord with Circulars RHM 7465.8 and 7465.9.

Upon plaintiff's motion for a temporary restraining order, and after this Court unsuccessfully attempted to schedule a prompt hearing where both sides could be present, this Court entered an order on January 7, 1972, granting plaintiff's motion for a temporary restraining order, restraining the defendant from evicting the plaintiff, upon the condition that the plaintiff post a bond in the amount of $65. The plaintiff posted the bond, and a hearing was scheduled for January 17, 1972.

At the January 17th hearing, defense counsel apppeared and stated he would not oppose the entry of a preliminary injunction against the Housing Authority, enjoining the eviction of the plaintiff until this cause could be completed. The Court entered an order on January 17, 1972, granting plaintiff's motion for preliminary injunction and scheduling this

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cause for final hearing on February 11, 1972. Counsel were ordered to file a stipulated statement of facts, in the way of a pre-trial stipulation, prior to the February 11th hearing.

Prior to the scheduled final hearing, counsel for the plaintiff moved the Court to join the United States of America, Department of Housing and Urban Development as a party to this cause. Because of this development, the Court postponed the February 11th final hearing to give the U.S. Attorney an opportunity to discuss the case with the appropriate government authorities to determine whether the government wished to intervene in this cause.

On March 16, 1972, the Government notified the Court that it wished to be added as a party defendant to this cause. In accord with that notice, this Court entered its order joining the United States as a party defendant and granting the Government 60 days to file responsive pleadings. The Government filed its answer and a cross-claim on May 24, 1972. This cause is presently scheduled for pre-trial on October 16, 1972, and trial on October 31, 1972.

As stated earlier, prior to the originally scheduled final hearing, counsel were ordered to file a stipulated statement of facts or pre-trial stipulation. This was done on February 4, 1972. The plaintiff and defendant Housing Authority stipulated therein to the fact that the plaintiff Lowery was a tenant in a Housing Authority in West Palm Beach, Florida,

TOO CLOSE IN CENTER

that a dispute arose concerning whether the plaintiff was in arrears on his rent, that eviction proceedings were instituted against Lowery, and that the defendant Housing Authority received the H.U.D. Circulars RHM 7465.8 and 7465.9 but that it has not implemented and does not employ the Model Lease and Grievance Procedure contained therein and has no plans to do so. Similarly, defendants' answer to plaintiff's compaint admits the factual allegations contained therein but denies that the H.U.D. Circulars RHM 7465.8 and 7465.9 place any mandatory requirement upon the defendant Housing Authority. The Housing Authority further claimed therein that the issuance of these circulars by H.U.D. exceeds and conflicts with the powers conferred upon H.U.D. by the U.S. Housing Act of 1937. And, in reply to the United States' cross-claim, wherein the United States alleged that these regulations or circulars are valid and effective, the defendant Housing Authority filed a general denial.

It is clear that on the basis of all the pleadings including the defendant Housing Authority's answer to the complaint and cross-claim and the pre-trial stipulation filed by plaintiff and the Housing Authority, that there remains no genuine issue of material fact, Rule 56, Fed.R.Civ.P., and that this cause may properly be disposed of upon a motion for summary judgment. The only issues which remain to be determined herein are issues of law—whether the Department of Housing and Urban Development could

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validly issue Circular RHM 7465.8 and 7465.9, Model Lease and Grievance Procedure, and whether the implementation of these by the Housing Authority is mandatory.

On June 5, 1972, in a case similar to this cause concerning the Pahokee Housing Authority, *McElveen* v. *Pahokee Housing Authority*, Case No. 71-1727-Civ-CF (S.D. Fla. 1971), this Court held that on the basis of *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 277 (1969), that Circulars RHM 7465.8 and 7465.9 are mandatory and *must* be adopted by the Housing Authorities. This Court further held that on the basis of *Glover* v. *Housing Authority*, 444 F.2d 158 (5th Cir. 1971), these Circulars are validly imposed upon the Housing Authority by H.U.D. Finally, this Court held that there existed no conflict between state law and the model lease and grievance procedure in question and that Florida Statute §421.21 specifically authorizes "every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the . . . operation of any housing project by such authority." The questions of law presented herein are identical to those in *McElveen* v. *Pahokee Housing Authority*. Thereupon, it is

ORDERED and ADJUDGED as follows:

1. By this Court's order of January 17, 1972, plaintiff's request that this cause be maintained as

TOO CLOSE IN CENTER

a class action in accord with Rule 23, Fed.R.Civ.P., was denied. However, for all intents and purposes, the law established here will be the rule of the Court with respect to the Housing Authority's relationship with all its tenants;

2. Plaintiffs' motion for summary judgment is hereby granted;

3. Circulars RHM 7465.8 and 7465.9 are hereby declared to be validly imposed by H.U.D. and mandatory upon the Defendant Housing Authority;

4. Counsel shall promptly meet and jointly draft a model lease and grievance procedure which meets the mandates of Circulars RHM 7465.8 and 7465.9. Counsel may wish to refer to *McElveen* v. *Pahokee Housing Authority*, Case No. 71-1727-Civ-CF, for guidance in the preparation of this lease and grievance procedure;

5. After meeting, counsel shall jointly prepare and submit to the Court within 40 days from the date of this order a proposed final judgment form along with a jointly prepared model lease and grievance procedure. The Court recognizes and hereby reserves the right of any party to appeal this cause; however, counsel shall nevertheless make the prepara-

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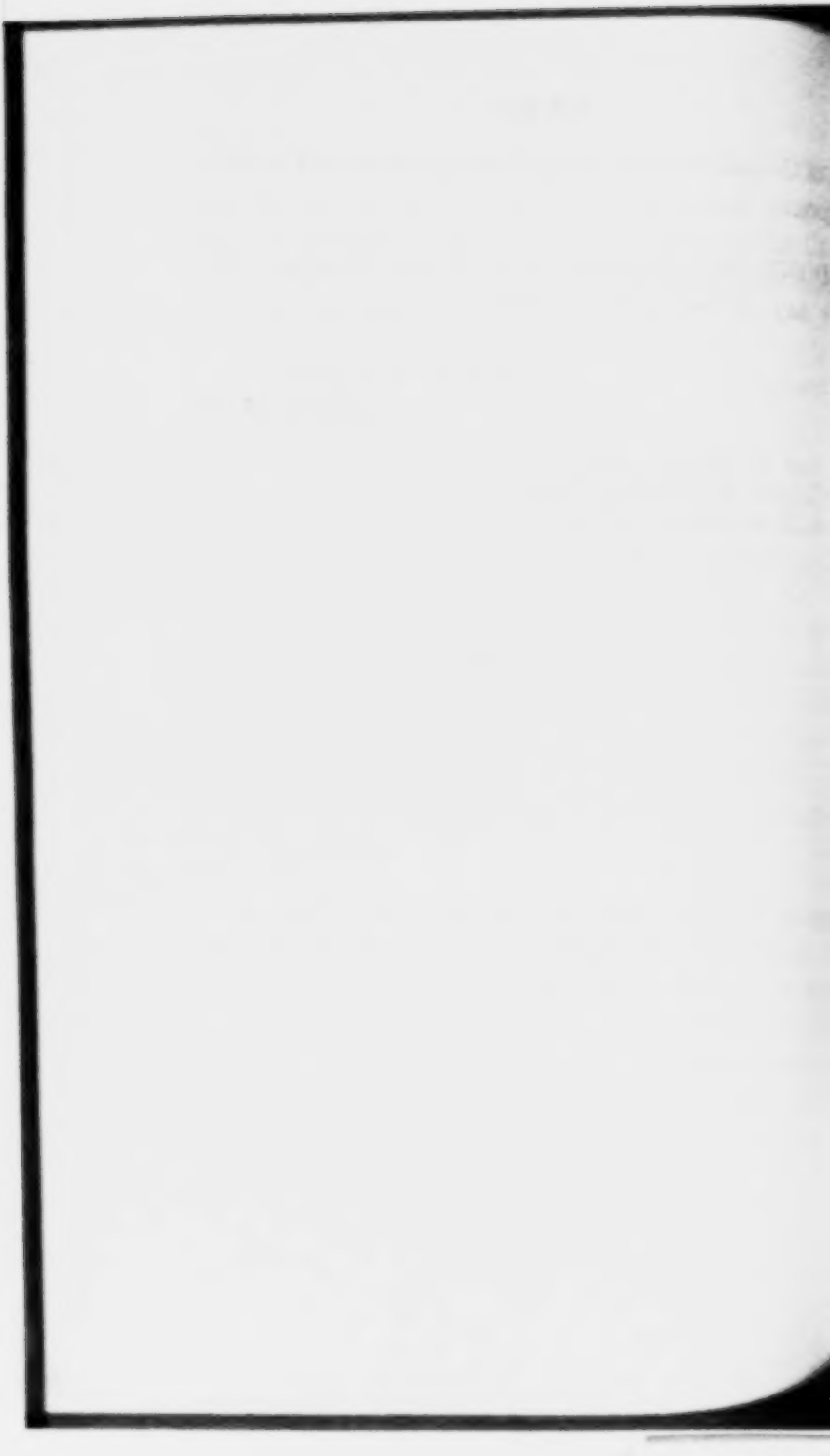
tion of the model lease and grievance procedure a joint project.

DONE and ORDERED in Miami, Florida, this 11th day of September, 1972.

CHARLES B. FULTON
Chief Judge

cc: Joel T. Daves, Esq.
Robert H. Graddy, Esq.
U.S. Attorney



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RA-39

**No. 72-793**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,
*Petitioners,*

v.

UNITED STATES HOUSING AUTHORITY, et al., and

NATIONAL TENANTS ORGANIZATION, et al.,
*Respondents.*

## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 1973, three copies of the above Brief in Response to Petition for Writ of Certiorari were airmailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and the attorneys who appeared for the Government and The Housing Authority of the City of Omaha, Nebraska, et al., in the United States Court of Appeals for the Eighth Circuit.

Alvin Hirshen

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 8 |
| Conclusion | 13 |


CITATIONS


Cases:

*Brown* v. *Housing Authority of the City of Milwaukee*, C.A. 7, No. 72–1259, decided December 8, 1972 — 10, 11

*Chicago Housing Authority* v. *Harris*, 49 Ill. 2d 274, 275 N.E. 2d 353 — 10, 11

*Glover* v. *Housing Authority of the City of Bessemer, Ala.*, 444 F. 2d 158 — 10

*Hahn* v. *Gottlieb*, 430 F. 2d 1243 — 11

*Housing Authority of the City of Milwaukee* v. *Mosby*, 53 Wis. 2d 275, 192 N.W. 2d 913 — 10

*Langevin* v. *Chenango Court, Inc.*, 447 F. 2d 296 — 11

*Lewis* v. *Housing Authority of the City of Talladega, Alabama*, N.D. Ala., No. 67–106, decided May 26, 1972 — 10

*Lowery* v. *Housing Authority of the City of West Palm Beach, Florida, Inc.*, S.D. Fla., No. 71–1956, Civ. CF, decided September 11, 1972 — 10




493–252

Cases—Continued Page
*National Labor Relations Board* v. *Wyman Gordon Co.*, 394 U.S. 759 ..... 11
*Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 ..... 3, 9, 10, 12
Constitution, statutes and regulations:
Constitution of the United States, Fifth Amendment ..... 2, 7, 12
Administrative Procedure Act:
Section 4, now 5 U.S.C. 553 ..... 2, 3, 10, 11
Section 4(a)(2), now 5 U.S.C. 553(a)(2) .. 3, 7, 10, 11
Housing Act of 1959, 73 Stat. 679 ..... 6
United States Housing Act of 1937, as amended:
Section 1, 42 U.S.C. 1401 ..... 2, 3, 6, 7, 8, 10
Section 2, 42 U.S.C. 1402 ..... 3, 8
Section 8, 42 U.S.C. 1408 ..... 2, 3
Section 10, 42 U.S.C. 1410 ..... 3
HUD Regulations:
RHM 7465.1 (Supp. 2) ..... 5
RHM 7465.8 (circular 8) ..... 3, 11
RHM 7465.9 (circular 9) ..... 3, 4, 10
Miscellaneous:
36 Fed. Reg. 4291 ..... 11
H. Rep. No. 566, 86th Cong., 1st Sess. p. 48 (1959) ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–793

HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, ET AL., PETITIONERS

*v.*

UNITED STATES HOUSING AUTHORITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals is reported at 468 F. 2d 1 (Pet. App. 22–39). The opinion of the district court is reported at 54 F.R.D. 402 (Pet. App. 1–10).

### JURISDICTION

The judgment of the court of appeals was entered on September 28, 1972 (Pet. App. 22–39). A timely petition for rehearing en banc was denied on October 26, 1972 (Pet. App. 40–56, 57). The petition for a writ of certiorari was filed on November 29, 1972. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Secretary of Housing and Urban Development ("HUD") has statutory authority to require, by regulation, certain minimum tenant lease provisions and grievance procedures in the low-rent housing program established by the United States Housing Act of 1937, as amended, 42 U.S.C. 1401, *et seq.*

2. Whether the regulations promulgated by HUD in the low-rent housing program are exempt from the formal rule-making requirements of Section 4 of the Administrative Procedure Act, now 5 U.S.C. 553.

3. Whether the HUD regulations impair contractual obligations in contravention of the Fifth Amendment.

## STATUTES INVOLVED

42 U.S.C. 1408 provides:

> [HUD] may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter.

42 U.S.C. 1401 provides in pertinent part:

> * * * It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies. * * *

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5 U.S.C. 553 provides in pertinent part:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
>
> * * * * *
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.
>
> * * * * *

**STATEMENT**

Under the United States Housing Act of 1937, as amended, 42 U.S.C. 1401 *et seq.*, federal funds are provided through the Secretary of Housing and Urban Development ("HUD") to local public housing agencies who are authorized to develop or administer low-rent housing projects or slum clearance. 42 U.S.C. 1401, 1402. By means of a contract—the Annual Contributions Contract (ACC)—between the United States and the local housing authorities, the United States makes annual contributions of a fixed amount for a fixed period of years to assist in achieving and maintaining the low-rent character of the local housing projects. 42 U.S.C. 1410.

Pursuant to Section 8 of the Act, 42 U.S.C. 1408, which authorizes such regulations as may be necessary to carry out the provisions of the Act, HUD issued the regulations here involved: circulars RHM 7465.8 and RHM 7465.9 (hereafter circular 8 and circular 9).[1] Circular 8 requires that tenant leases used by the local housing authorities contain certain

[1] HUD regulations are contained in a permanent manual. Changes in the manual are initially promulgated as circulars, which are later physically incorporated into the manual. See *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 275.

minimum rights and obligations of the parties, including provisions that rental payments are to be accepted without regard to other charges assessed against a tenant; that the tenant is to take reasonable care of the premises and to pay for damage intentionally or negligently caused; that if defects which are hazardous to life, health and safety are reported to management and not corrected within 72 hours, or alternate accommodations provided, there will be an abatement of rent until repairs are made; that inspection of the premises may be made only upon written notice during reasonable hours unless an emergency exists; that management can terminate the lease only for good cause; and that all grievances are to be processed according to the management grievance procedure (A. 91).[2]

Circular 9 outlines the minimum requirements for the grievance procedure, under which the tenant is entitled to a hearing before either an impartial officer or panel on any dispute concerning the lease, or any housing authority regulations, policy or procedures that adversely affect him. He is also entitled to reasonable notice of the grounds for the housing authority's disposition of the initial complaint, and the right to counsel and to present and cross-examine witnesses. Circular 9 also requires a written decision specifying the reasons for the ruling and provides that a decision adverse to the housing authority is binding unless arbitrary or capricious, but both sides may obtain judicial relief from a decision adverse to the tenant (A. 103).

[2] "A" refers to the appendix in the court of appeals.

HUD issued these circulars after more than a year's discussion and negotiation between tenant representatives and housing authorities. In December 1969, HUD, in recognition of the detrimental effect that a deteriorating landlord-tenant relationship would have on the national housing policy, convened a Conference on Tenant's Rights and Responsibilities (A. 47–49). At that meeting, an "ad hoc" task force, chaired by HUD, and consisting of representatives of the National Association of Housing and Redevelopment Officials (NAHRO)[3] and the National Tenants Organization (NTO) was established to develop a model lease and grievance procedure (A. 49). In November 1970, NAHRO and NTO agreed on both a model lease and a model grievance procedure (A. 52). After further departmental consideration, HUD, on February 22, 1971, issued circulars 8 and 9 (A. 53).

Subsequently, on May 7, 1971, in order to obtain compliance with the circulars, HUD issued RHM 7465.1, Supp. 2, which directs local HUD officials to encourage implementation of circulars 8 and 9 within a reasonable time (Pet. App. 19). Upon failure of a housing authority to implement the circulars, the area directors are to recommend what action should be taken "such as withholding funds (*other than guaranteed subsidies*), referral * * * to the Department

[3] Although NAHRO is not the legal agent of their membership, it serves as the national representative for member housing authorities throughout the country. As of June 30, 1971, there were 2,195 public housing authorities; 1,045 of them, with 75 percent of the housing units, were members of NAHRO (A. 49).

of Justice for action to enforce compliance, or such other action as may be authorized and deemed appropriate" (Pet. App. 20) (emphasis added). No enforcement action can be taken without the approval of the Washington Central Office and no recommendation for withholding funds has been made to that office (A. 55).

The petitioners challenged the circulars in a suit brought as a class action on the grounds that the rule-making requirements of the Administrative Procedure Act were not followed; that the circulars violate the provision of the United States Housing Act of 1937, as amended, 42 U.S.C. 1401 *et seq.*, which declares it to be "the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program";[4] and that an alleged conflict between the circulars and the Annual Contributions Contract, and the threatened withholding of funds constitute a deprivation of property without due process of law (A. 1–9).[5]

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[4] The Housing Act of 1959, 73 Stat. 679, amended Section 1 of the United States Housing Act of 1937 by adding the "local autonomy amendment," which provides:

> It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of [HUD]), with due consideration to accomplishing the objectives of this chapter while effecting economies.

[5] HUD answered and counterclaimed for a declaration that the circulars were valid and for an order directing plaintiffs

The district court granted summary judgment for the plaintiffs, holding that the circulars violated the policy of vesting maximum responsibility in local housing authorities as expressed in 42 U.S.C. 1401 (Pet. App. 6–10). Although believing that the circulars were not exempt from the rule-making requirements of the Administrative Procedure Act, the court found that there was a factual issue whether the plaintiffs had actual notice of the circulars and that this precluded resolution of the question whether HUD had violated the APA in promulgating the circulars (Pet. App. 4, 5). The district court also found a question of fact present on the issue whether the circulars improperly conflict with the ACC (Pet. App. 4).

The court of appeals reversed, holding that both the statute and its legislative history make clear that the policy expressed in 42 U.S.C. 1401 does not preclude HUD from exercising "the ultimate supervision and authority in carrying out the objectives of the Housing Act" (Pet. App. 30). The court further held that since the circulars directly supplement the Annual Contributions Contract, they were exempted by 5 U.S.C. 553(a)(2) from the rule-making provisions of the APA (Pet. App. 36). With respect to the contention that the circulars violated the Fifth Amendment, the court found that the threatened withholding of funds presented only a hypothetical question, unnecessary for the court to decide, and that

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to comply with the circulars. Subsequently, NTO, local tenant organizations and tenants were permitted to intervene (A. 15-20).

there was "little merit" in the objection that the circulars improperly altered the ACC (Pet. App. 37).

## ARGUMENT

The ruling of the court of appeals is correct, and in accord with every other decision on point. Further review is therefore unwarranted.

1. Petitioners contend that HUD's circulars improperly impinge upon the general policy of the Act to vest maximum authority in local housing authorities. But Section 1401 vests authority in the housing authorities only with respect to the "administration"[6] of the program and even in that area the delegation of authority is qualified.[7] In this regard the court of appeals stated (Pet. App. 31):

> In interpreting Section 1401, we find it significant that (1) there was not a complete transfer of authority to the local housing authorities, (2) although "administration" is not confined to

[6] "Administration" is defined as the "undertakings necessary for management, operation, maintenance, or financing, in connection with a low-rent housing * * * project * * *" and the "financing of tenant programs and services for families residing in low-rent housing projects * * *." 42 U.S.C. 1402.

[7] Section 1401 vests responsibility for the establishment of rents and eligibility requirements, *subject to the approval of HUD*. This is significant because the delegation of responsibility for the establishment of rents and eligibility requirements was a primary objective of the amendment to Section 1401 and even in those matters, the responsibility of the housing authorities is limited. See H. Rep. No. 566, 86th Cong., 1st Sess., p. 48 (1959). Further, the responsibility is vested in the housing authorities "*with due consideration to accomplishing the objectives of this chapter while effecting economies*" (emphasis added).

> budgetary acts and may necessarily be related to policy decisions, the ultimate responsibility for policy lies with the National Authority to achieve uniformity in fulfilling the objectives of the Act, and (3) where HUD determines that local authorities have failed to act or have acted in an inimical way to the objectives of the Act, that the ultimate authority is vested in HUD to set overall policy.

The court below therefore correctly determined that Section 1401 does not restrict HUD's "responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408" (Pet. App. 33).

2. There is no conflict between the decision below and this Court's decision in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268. On the question of HUD's statutory authority to issue the circulars, the court of appeals, following *Thorpe*, considered whether the circulars "have a 'reasonable relationship to the purposes for which HUD's rule-making power was authorized.'" (Pet. App. 27). In *Thorpe*, this Court noted that one of the purposes of the federal housing acts is to provide a " 'decent home and a suitable living environment for every American family' " (393 U.S. at 281). The court of appeals here determined that the relationship of the circulars to the purposes of the housing acts was "self-evident" in view of the statement by HUD that the circulars were intended to eliminate landlord-tenant hostility and antagonism

and thereby improve the quality of the living environment (Pet. App. 27).[8]

Moreover, with the exception of the district court in this case, other courts have consistently upheld circular 9 against the contention that Section 1401 precludes HUD's promulgation of the circular.[9] *Brown* v. *Housing Authority of the City of Milwaukee*, C.A. 7, No. 72–1259, decided December 8, 1972; *Lowery* v. *Housing Authority of the City of West Palm Beach, Florida, Inc.*, S.D. Fla., No. 71–1956—Civ. CF, decided September 11, 1972; *Chicago Housing Authority* v. *Harris*, 49 Ill. 2d 274, 275 N.E. 2d 353.

3. The rule-making requirements of Section 4 of the Administrative Procedure Act, now 5 U.S.C. 553, do not apply when there is involved "a matter relating to * * * contracts." 5 U.S.C. 553(a)(2). Since here, as in *Thorpe* (393 U.S. at 279), the circulars supplement the Annual Contributions Contract, they are

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[8] *Thorpe* did not, as petitioners contend (Br. 13–14), deal with limitations upon the extent of HUD's authority to issue regulations. *Thorpe* involved an eviction notification procedure, and this Court rejected as "untenable" the contention that such a circular violated the congressional policy to vest maximum responsibility in local housing authorities (393 U.S. at 278). The Court did cite a portion of the housing authority's brief to establish the "minimal effect upon the Authority's 'responsibility in the administration'" of a housing project (393 U.S. at 277–278), but this was certainly not intended to limit HUD's authority to issue appropriate regulations.

[9] Circular 9 has also been consistently applied by lower courts. *Glover* v. *Housing Authority of the City of Bessemer, Ala.*, 444 F. 2d 158 (C.A. 5); *Lewis* v. *Housing Authority of the City of Talladega, Ala.*, N.D. Ala., No. 67–106, decided May 26, 1972; *Housing Authority of the City of Milwaukee* v. *Mosby*, 53 Wis. 2d 275, 192 N.W. 2d 913.

excepted from Section 4 of the Administrative Procedure Act. *Brown* v. *Housing Authority of the City of Milwaukee, supra; Chicago Housing Authority* v. *Harris, supra; Hahn* v. *Gottlieb,* 430 F. 2d 1243 (C.A. 1); *Langevin* v. *Chenango Court, Inc.,* 447 F. 2d 296 (C.A. 2).[10]

Moreover, this issue is not of recurring importance because on March 4, 1971, HUD voluntarily adopted a policy of following the rule-making requirements of Section 4 of the APA. 36 F.R. 4291.

5. Petitioners' complaint alleged that the circulars conflict with paragraph 203B of the Annual Contributions Contract and thereby constitute an impairment of contract in violation of the Fifth Amendment (A. 8).[11] Circular 8 was expressly intended to implement paragraph 203(B) and contains nothing inconsistent with that provision (A. 92). Although circular 8 contains requirements in addition to those specified in 203(B), there is no prohibition in that

[10] The decision below does not conflict with *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759. That case concerned the use of adjudicatory procedures in lieu of the rule-making requirements and did not involve the Section 4 (a)(2) exception.

[11] Because of modifications of the ACC there are different versions of paragraph 203(B). One version requires that a written lease be executed by a responsible member of the family and that the lease contain all provisions necessary to meet the requirements of the Act and the Contract. The other version requires in addition to the foregoing that the lease shall not be terminated by the local authority except for violation of the lease or other good cause and that in terminating a tenancy the local authority shall inform the tenant in a private conference of the reasons for termination and provide an opportunity to reply (A. 7, 8, 92).

paragraph precluding such additional requirements. Accordingly, here as in *Thorpe*, "[t]he respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged" (393 U.S. at 279).[12]

Moreover, there can be no doubt of HUD's authority to issue at least some regulations imposing burdens upon local housing authorities in the operation of this program. A public institution such as a local housing authority necessarily makes its contracts, under which it receives Federal funding, subject to that regulatory authority. And the exercise of that authority is not an "impairment" of the contract within the meaning of the Fifth Amendment.

The court of appeals properly rejected as hypothetical the contention that the threat to withhold funds if the circulars were not implemented violated the Fifth Amendment (Pet. App. 37). No recommendation for withholding funds has ever been made and since that approach was merely suggested as one possible alternative, there is no substantial likelihood that funds ever will be withheld. In any event, any issues arising from the withholding of funds relate only to the validity of that action and not to the validity of the circulars.

6. There is nothing to petitioners' final contention that the "Court of Appeals passed over in silence additional serious objections to the actions of HUD"

[12] There are no allegations in the complaint in this case which raise the question whether the circulars impair the contractural obligations in the leases between the tenants and the housing authorities (A. 1-9).

(Pet. 21). In the court of appeals petitioners did not make any due process argument with respect to either the promulgation of the circulars or the delegation of authority to the hearing panels. The court said nothing about these issues because petitioners failed to raise them.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
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JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

No. 72-793

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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HOUSING AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, et al.,

Petitioners,

v.

UNITED STATES HOUSING AUTHORITY, et al., and

NATIONAL TENANTS ORGANIZATION, et al.,

Respondents.

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## THE RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR CERTIORARI SHOW WHY THE WRIT SHOULD ISSUE

### 1. Federal Respondents Now Concede That The Court Below Fundamentally Misapprehended What The HUD Circulars Require.

The Court of Appeals below grossly misinterpreted the nature of the HUD Circulars at issue when it held that Circular 9's grievance procedures do "*not* basically alter the lease • • • these grievance procedures may be invoked *only* when the Local Authority is alleged to have violated the actual terms of the lease" (A-29, emphasis added).* Neither set of respondents has challenged the accuracy of petitioners' showing of how the Court of Appeals' descrip-

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* That both of these statements are unfounded was pointed out below by petitioners (A-43-5).

tion of the Circulars clashes with reality. But federal respondents go further; they now specifically underscore the fundamental misapprehensions of the court below when they concede (p. 4) both that every lease must be altered to provide, among other things, that "all grievances are to be processed according to the management grievance procedure" and that that procedure applies to "*any* dispute concerning • • • *any* housing authority regulations, policy or procedures" claimed to affect adversely any tenant (emphasis added).

The candor of the federal respondents as to what the Circulars require is less evident when they discuss other aspects of the HUD imposed grievance procedure. Thus they say: "both sides may obtain judicial relief from a decision adverse to the tenant" (p. 4). In other words, a LHA "may obtain judicial relief" from a decision favorable to it! The fact of the matter, as we stated in our Petition (pps. 6, 16), is that under the Circulars "two proceedings would be required before any LHA could obtain relief against any tenant whatever the nature of the dispute • • • the Circulars require two hearings to collect for a broken window or enforce a pet regulation".

Petitioners suggest that federal respondents' tacit concessions that the Court of Appeals did not comprehend the effect of the Circulars before it, and all respondents' failure to challenge petititoners' accurate description of the sweeping effect of the Circulars, are reasons enough for our Petition to be granted.

**2. Respondents' Briefs Assist In Demonstrating That The Opinion Of The Court Below Writes The 1959 "Local Autonomy Amendment" Out Of The Act.**

The federal respondents do concede in a footnote (p. 6) the existence of the 1959 "local autonomy amendment" which this Court summarized in *Thorpe* as the "congres-

sional policy of allowing [LHA's] to retain maximum control over the *administration* of federally financed housing projects" (393 U.S. at 278, emphasis added). In another footnote (p. 8) federal respondents also concede that the Act defines "administration". But federal respondents fail to quote precisely the Act which provides: "The term 'administration' means *any or all* undertakings necessary for management, operation, maintenance * * * in connection with a low rent housing * * * project (42 U.S.C. § 1402(6), emphasis added). Federal respondents omit the phrase "any or all" from their quotation of the Act's definition.

What is clear, and conceded, at least by federal respondents, is that HUD Circulars 8 and 9 must be measured against a congressional policy that LHA's are to retain "maximum control" over "any or all undertakings necessary for [the] management [and] operation" of federally financed housing projects.

But neither set of respondents will admit that the 1959 "local autonomy amendment" imposes any limitation upon the power of HUD to make rules. Thus, federal respondents argue that HUD may issue whatever rules it pleases if intended to "eliminate landlord-tenant hostility and antagonism" with a view to improving "the quality of the living environment" (pps. 9, 10); NTO respondents describe HUD's power in almost identical terms (p. 9).

The briefs of both sets of respondents show that they stand fast with the Court of Appeals in rejecting the policy of the United States Congress, properly applied by the District Court,* that progress toward the broad goals of the

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* Both federal respondents (p. 10) and NTO respondents (p. 12) suggest that the District Court's opinion invalidating the Circulars is contrary to other decisions. But the opinions cited by the respondents almost all arose in an eviction dispute context and HUD was not a party to any of those cases, a critical factor noted by this Court in *Thorpe*.

Housing Act was to be accomplished by means which leave maximum responsibility for the administration of housing projects at the local level; HUD's powers have been circumscribed by Congress and HUD has not been left free, as held by the court below and insisted upon by respondents, to issue any and all rules it believes might improve the quality of life in public housing projects.

Federal respondents join with the court below in claiming (p. 9) the "local autonomy amendment" "does not restrict HUD's responsibility and concomitant authority to protect and further the purposes and objectives of the Act as expressly evidenced by Section 1408". But all that section (42 U.S.C. § 1408) evidences is that HUD has the power to make rules "as may be necessary to carry out the provisions" of the Act. Thus the federal respondents take the position that a boiler plate grant of authority to an agency to make rules in accord with the provisions of the applicable Act may be relied on as authority to set aside a provision of the Act, in this case the 1959 "local autonomy amendment". At best, that is an untenable position.

### 3. What Respondents Say And Fail To Say About This Court's Opinion In Thorpe v. Housing Authority, 393 U.S. 268 (1969), Assists In Laying Bare The Fundamental Error Of The Court Below.

Petitioners have pointed out (pps. 12-16) that the *reasoning* and the principles set forth by this Court in *Thorpe* were not followed by the court below. Respondents' challenge to this argument reduces to the dogmatic claim that petitioners have got to be wrong. Beyond that, what they say makes no sense.

Thus, NTO respondents argue that, since this Court in *Thorpe* sustained the validity of the HUD Circular then

before it, this apparently requires that all other HUD Circulars must also be held valid (p. 10). The federal respondents struggle with *Thorpe* in a footnote (p. 10) stating that what this Court said "was certainly not intended to limit HUD's authority to issue appropriate regulations". This formulation of *Thorpe* simply begs the question of what constitutes an "appropriate regulation". In *Thorpe* this Court tested a HUD regulation to determine whether it was appropriate in light of the congressional policy to vest maximum responsibility for administration in local housing authorities and that particular HUD regulation passed. As we point out in our Petition (pps. 12-16), so tested, HUD Circulars 8 and 9 can not be sustained.

As we pointed out in our petition (p. 15), *Thorpe* anticipated the contract impairment issue raised in this case by HUD's threats and arguments that it can repudiate its obligations under the annual contributions contract if an LHA fails to apply the Circulars. In their brief in opposition, federal respondents now claim the right to add to the obligations of annual contribution contracts since those contracts contain nothing "precluding such additional requirements" (pps. 11, 12). Thus federal respondents endorse a new principle of contract law presumably applicable only to HUD: HUD may amend contracts it has entered into at its pleasure so long as the existing contract does not "preclude" HUD from changing it. This notion is, of course, untenable. As this Court pointed out some years ago and reaffirmed in *Thorpe*: "'[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.' *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)." (393 U.S. at 278 n. 31.) In *Lynch* this Court went on to state: "When the United States

enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (292 U.S. at 579.) What's true of the United States is, of course, true for HUD.

**4. Respondents' Arguments On The Administrative Procedure Act Issue Also Underscore The Reasons Why The Writ Of Certiorari Should Be Granted.**

The Court of Appeals held (A-35) that whenever an agency distributes federal moneys there is established a "governmental 'proprietary interest'" so that it may regulate the recipients of such moneys without any regard to the procedural safeguards established by the Administrative Procedure Act. Petitioners have pointed out (p. 17) the absurdity of the notion that the administration of federally financed housing projects is a matter where the government's interest is "proprietary" and respondents have said nothing in opposition. Clearly, if HUD, or any other agency in such areas as Defense or Health, Education and Welfare, has unbridled discretion whether or not to follow the Administrative Procedure Act, that Act is effectively emasculated, and such will be the effect if the decision of the Court of Appeals is permitted to stand. Laws, such as the Administrative Procedure Act, intended to limit the power of the bureaucracy are meaningless if the bureaucracy has unbridled discretion to determine for itself whether and when it elects to be bound by the law.

Both briefs in opposition appear to concede, along with the court below (A-35), that one test of whether the exception to Section 4 of the Administrative Procedure Act relating to "public contracts" applies is that the rule and the public contract must be *directly* related. Both briefs go on to insist, as did the Court of Appeals, that language from this Court's decision in *Thorpe* v. *Housing Authority of*

*Dunham,* 393 U.S. 268 (1969), establishes the requisite *direct* relationship between the regulations and HUD contracts with LHA's. In point of fact, however, the *Thorpe* decision holds exactly the opposite.

In *Thorpe,* dealing with a HUD regulation having a *de minimus* effect upon an LHA's power to administer its projects and finding that it was not in derogation of the LHA's contract rights, this Court stated (393 U.S. at 279), "Although the Circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's *wholly independent* rule making power" (emphasis added). In other words, HUD circulars are not related to HUD contracts. Respondents and the Court of Appeals wrench this language from a context having nothing to do with the Administrative Procedure Act to support the view that the Circulars "directly supplement" the annual contributions contract (A-36), hence the test that the Circulars must be "*directly* involved" (emphasis in original) with a public contract (A-35) is met, and thus HUD need not comply with Section 4 of the Administrative Procedure Act.

We suggest that an opinion or an argument which so misconstrues this Court's actual words is charitably described as dubious. In any event, at the very least, the writ of certiorari should be granted to determine whether, on the Administrative Procedure Act issue, the decision of the Court of Appeals below "has decided a federal question in a way in conflict with applicable decisions of this Court" (Sup. Ct. R. 19(1)(b)).

Obviously troubled by the lack of merit in their arguments, both groups of respondents argue that the Administrative Procedure Act issue is unimportant because on March 4, 1971 (a scant ten days after promulgation of the

challenged Circulars) HUD announced that *henceforth* it would follow the requirements of Section 4 of the Administrative Procedure Act with respect to rules and regulations issued by it. This, we suggest, constitutes a tacit admission by HUD that its procedures in issuing the challenged Circulars were illegal; but this retrospective act of penance in no way deprives the decision below of its significance or of the importance for this Court to review that decision. The prospective procedural change by HUD in no way cures the invalidity of the procedure whereby Circulars 8 and 9 were promulgated.

**5. Federal Respondents Have Misconstrued The Record In The Lower Courts.**

The court below held that: "Since there exists no threatened loss of funds for failure to comply with Circulars 8 and 9, the issue of contract impairment at this time is purely hypothetical" (A-37) despite the fact that HUD had formally announced that the withholding of funds was a means it would utilize to enforce the Circulars (A-37) and evidence that in December 1971, all LHA's in Kentucky received a written direct threat from HUD that modernization funds will not be allocated to any LHA that has not adopted the Circulars, and where such funds have been allocated, HUD will not approve expenditure until they are adopted (A-52).

Apparently unwilling to contest the reality of the threats, federal respondents transform the real issue, whether there is a threat to withhold funds, to the imaginary issue of whether a "recommendation for withholding funds has ever been made" (p. 12). This view is as surprising as would be the argument that a kidnapping is not complete until there has been a recommendation that the ransom be paid.

Federal respondents state (p. 13) that in the Court of Appeals petitioners did not make any "due process argu-

ments with respect to either the promulgation of the Circulars or the delegation of authority to the hearing panels", and the court below said "nothing about these issues because petitioners failed to raise them". These statements are strange indeed when it is remembered that petitioners were appellees in the court below and not appellants. Those issues, although raised in the complaint,* were not reached by the District Court and did not come to the fore in the Court of Appeals until release of its opinion at which point they were promptly brought to the attention of that court in the petition for rehearing (A. 48, 54). The importance of thoughtful consideration of due process issues in rule making is underscored by the discussion in both the majority and minority opinions in this Court's recent decision in *U.S.* v. *Florida East Coast Railway Company et. al,*— U.S.—(January 23, 1973).

## CONCLUSION

For all of the above reasons, and those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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* Par. XIII alleges: "The rules and regulations contained in [the] Circulars . . . were issued in violation of the requirements of due process of law."